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In the Supreme Court of the United States

OCTOBER TERM, 1995

GORDON L. RUSH, JR.,

Petitioner

VERSUS

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Was The Trial Court In Error When It Ruled That The Defendant Rush Did Not Have A Constitutional Right To Waive The Jury Over The Government's Objection Notwithstanding The Complexities Of the Factual And Legal Issues Involved, And Did The Appellate Court Err In Upholding That Ruling?

2) Did The Trial Court Err In Failing To Dismiss The Indictment For Violation Of Rule 7(c) Of The Federal Rules Of Criminal Procedure, Requiring That It Be Plain, Concise And Definite, And Did The Appellate Court Err In Upholding That Ruling?

LIST OF PARTIES

The parties to this case are the petitioner, Gordon L. Rush, Jr. and the United States of America as respondent.

TABLE OF CONTENTS

Questions Presented.....i

List of Parties.....ii

Table of Contents.....iii

Table of Authorities.....v

Opinions Below.....1

Jurisdiction.....1

Statutes Involved.....1

Statement of the Case.....1

A) Course of Proceedings and Disposition in Courts Below.....1

B) Statement of Facts.....3

Reasons for Granting the Writ

A) Introduction.....14

B) Was The Trial Court In Error When It Ruled That The Defendant Rush Did Not Have A Constitutional Right To Waive The Jury Over The Government's Objection

TABLE OF CONTENTS (continued)

Notwithstanding The Complexities Of the Factual And Legal Issues Involved, And Did The Appellate Court Err In Upholding That Ruling?.....15

C) Did The Trial Court Err In Failing To Dismiss The Indictment For Violation Of Rule 7(c) Of The Federal Rules Of Criminal Procedure, Requiring That It Be Plain, Concise And Definite, And Did The Appellate Court Err In Upholding That Ruling?.....24

Conclusion.....30

TABLE OF AUTHORITIES

Russell v. United States, 369 U.S. 749, 82 S.Ct. 1038 (1961).....26

Singer v. United States, 380 U.S. 24, 85 S.Ct. 783 (1965).....14,15,16,18

United States v. Braunstein, 471 F.Supp. 1 (D.N.J. 1979).....18

United States v. Chaney, 964 F.2d 437 (5th Cir. 1992)...26

United States v. Debrow, 346 U.S. 375, 74 S.Ct. 113 (1953).....26

United States v. Edrington, 726 F.2d 1029 (5th Cir. 1984).....26

United States v. Gordon, 780 F.2d 1165 (5th Cir. 1986).....26

United States v. Olatunsi, 872 F.2d 1161 (3rd Cir. 1989).....26

United States v. Olmstead, 5 F.2d 712, 715 (W.D. Wash 1925).....29

United States v. Panteleakis, 422 F.Supp. 247 (D.R.I. 1976).....17,18

United States v. Robichaux, 995 F.2d 565 (5th Cir.), *cert. denied*, 114 S.Ct. 322 (1993).....4

TABLE OF AUTHORITIES (continued)

United States v. Rosi, 27 F.3d 409 (9th Cir. 1994).....26

United States v. Rush, 5th Cir. Opinion No. 93-3603, pp. 7-8.....17,25

United States v. Shirk, 981 F.2d 1382 (11th Cir. 1992).....26

United States v. Silverman, 745 F.2d 1386 (11th Cir. 1984).....26

United States v. Webb, 747 F.2d 278 (5th Cir. 1984).....26

STATUTES:

United States Constitution amend. VI.....1

United States Constitution amend. XIV.....1

Fed. R. Crim. P. 7(c).....1,26,27,28,30

Fed. R. Crim. P. 23(a).....1

OTHER AUTHORITIES:

Kurland, *Providing a Federal Criminal Defendant With A Unilateral Right To A Bench Trial: A Renewed Cal To Amend Federal Rule Of Criminal Procedure 23(A), 26 U.C. Davis L. Rev. 309 (1993)*.....19

Webster's New World Dictionary, 2d.Ed.....17,25

Wright, *Federal Practice and Procedure*, §127, at 424-27.....25

PETITION FOR WRIT OF CERTIORARI

Petitioner, Gordon L. Rush, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Fifth Circuit, entered in the above-entitled proceeding on July 18, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, dated on June 5, 1995 is reprinted in the appendix.

JURISDICTION

The Court of Appeals' judgment was entered on July 18, 1995. Petitioner now invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendments VI and XIV to the United States Constitution and Rules 7(c) and 23(a) of the Federal Rules of Criminal Procedure are set forth in the appendix.

STATEMENT OF THE CASE

A. *Statement of Proceedings Below*

On April 23, 1992, the grand jury for the Eastern District of Louisiana returned a fifteen (15) page, twenty-one (21) count indictment charging petitioner Gordon L. Rush, Jr. and two others with various counts of conspiracy, mail fraud, and wire fraud. R. Vol. 1, pp. 266-280. The defendant Rush entered a plea of not guilty on April 30, 1992 and in addition to filing various discovery motions, *Ibid.* 58 - 106, the defendant Rush also filed a motion to waive trial by jury and be tried by the court alone, *Ibid.* 492, *Ibid.* 414, and an alternative motion to strike surplusage, *Ibid.* 421.

Without acknowledging that the defendant Rush was correct in his claim of duplicity the gevernment nevertheless determined to return a superseding indictment on October 1, 1992. R. Vol. II, p. 349. The defendant Rush reurged his motion to dismiss as to the superseding indictment. *Ibid.* 327.

The co-defendant McDermot also filed a motion to waive the right to trial by jury and be tried by the court alone, *Ibid.* 466. The government objected to the jury being waived and the court denied the motion as to both defendants. *Ibid.* 411. The district court denied the defendant Rush's motion to dismiss on the grounds of duplicity, but strongly critized the argumentative manner in which the indictment was drafted. Vol. III, pp. 813-818. In response to those observations by the court the defendant Rush filed a second motion to dismiss for failure of the indictment to comply with Rule 7(c) of the Federal Rules of Criminal Procedure. *Ibid.* 670. The district court in weighing the delays that had already ensued and the fact that the defense had no case law directly on point, denied the motion to dismiss stating that ::...[p]erhaps the future will offer an appropriate opportunity to address the interesting issue presented in this motion." *Ibid.* pp. 668-669.

The government dismissed Counts 2,3,4, and 8 of the superseding indictment, Vol. III, p. 702 and 638. Therefore, the Second Superseding Indictment contained 19 counts *Ibid.* 640-654.

The defendant Kochensparger pleaded guilty to Count 1 of the indictment, Vol. II, p. 441, and the defendant Rush with the co-defendant Peter McDermot proceeded to trial on January 11, 1993. The trial was concluded on January 22, 1993 and both defendants moved for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure and the court took those motions under submission. Vo. IV, p. 971. Vol. IX, p. 1649. The jury returned a verdict of guilty as to all counts as to both defendants. Vol. IV, p. 971. As the result of the death of the Honorable George Arceneaux, the judge who presided throughout the pre-trial and trial proceedings, the case was transferred to the Honorable Lansing L. Mitchell on April 13, 1993. Vol. IV, p. 949. Because Judge Mitchell had not presided over the trial and did not know what evidence had been presented the defense requested an evidentiary hearing to resolve issues relative to sentencing. Vol. IV, p. 914. The hearing was conducted on June 22, 1993, *Ibid.* p. 912 and additional evidence

was taken on June 24 and 25, 1993. *Ibid.*, pp. 908 and 910. The defendant McDermot filed a motion for new trial based upon Rule 25 of the Federal Rules of Criminal Procedure and the death of Judge Arceneaux, Vol. IV, p. 940 and the defendant Rush filed a motion for verdict of acquittal and an alternative motion for new trial based upon the same ground. Vol. V, p. 1317. Both motions were denied. Vol. IV, p. 940, Vol. V., p. 1248.

The defendants were sentenced on August 18, 1993, and the defendant Rush was committed to the custody of the Attorney General to be imprisoned for a term of 46 months as to each Count 1 through 19 to run concurrently; he was further fined $25,000.00 and upon release from imprisonment to be placed on supervised release for a term of 3 years. Vol. V, p. 1200. On August 24, 1993, defendant Rush timely filed his notice of appeal from both the conviction and sentence. Vol. V, p. 1197. On September 9, 1993, the government filed its notice of appeal regarding the sentence imposed on the Mr. Rush.

The defendant Rush appealed his conviction and sentence and the Fifth Circuit Court of Appeals affirmed the convictions and sentence and remanded the case to the district court to consider the possibility of further enhancement of Mr. Rush's sentence.

B. *Statement of Facts*

The government alleged that there was a scheme to defraud when Presidential Fire and Casualty Insurance Company (Presidential) was first formed in 1985 in that the assets that were supposed to be available for the Insurance Commissioner were supposedly encumbered; that certain federally insured securities, Federal National Mortgage Associations (hereinafter FNMAs) and Government National Mortgage Associations (hereinafter GNMAs), were bogus and that defendant Rush knew that they were bogus when they were used as surplus capital for Presidential; that certain FNMAs and municipal bonds infused into the company by the co-defendant Peter McDermot were bogus and known by the

defendant Rush to be bogus; and that the defendants Rush and McDermot diverted money from Presidential, A & R Capital and other companies owned by Rush for personal use and concealed the diversion of those monies. Vol. 3, pp. 640-645. The government further alleged that the defendent Rush in the operation of A & R Capital and its succesor company Emerald Financial and Mortgage, Inc. (A & R Capital/Emerald) failed to return to customers, who had financed insurance premiums through those companies, unearned premiums to which they were due when Lloyds of Louisiana Insurance Company was placed in liquidation. Vol 3, p. 651, 653.

The FNMAs/GNMAs were infused into the company by a one Ed Robichaux. Robichaux did not in fact own the securities and he was ultimately prosecuted and convicted. *United States v. Robichaux*, 995 F.2d 565 (5th Cir.), *cert. denied*, 114 S. Ct. 322 (1993). The government conceded that at the time the bogus nature of the Robichaux securities was discovered it had no reason to believe that Presidential and Rush were anything other than victims of Robichaux's scheme. Indeed, when the F.B.I. notified Mr. Rush regarding the bogus securities, Mr. Rush immediately notified the Insurance Commissioner and took the securities off Presidential's statement. Tr. 13 However, when Rush was later attempting to sell Presidential to Peter McDermot and some of the same numbered FNMAs were among the securities that McDermot was going to infuse into Presidential, the government found this to be "such a coincidence" as to conclude that the defendant Rush must have been knowledgeable about the bogus nature of all of the securities, *Ibid.*

The government called over 35 witnesses in its case but with the exception of the testimony of Martha Hunt regarding the Lloyds of Louisiana/LIGA refunds, to be discussed *infra*, there was no direct testimony that defendant Rush had knowingly done anything wrong. Most of the government witnesses were devoted to explaning the esoteric nature of FNMAs and GNMAs. Tr. 375-401 (Robert Grady); 402-411 (Jacques Hettena); 449-479 (Margaret McGrath); 482-493

(John Celifarco); 493-499 (Susan Needham); 493-499 (Robert Quirk); 499-502 (James Quale); 502-514 (Dennis Gillespie); 514-517 (John Dodson); 528-531 Frederick O'Neill); 531-534 (Sandy Smith); 534-535 (Lynette Hamilton); 535-538 (Mark Howard). While the totality of their testimony clearly established that Mr. McDermot did not own the FNMAs he had listed on his financial statement, it also established how convoluted the entire process was and how impossible it would be for Mr. Rush, or even his attorneys, to check on the ownership of any listed FNMA securities. In fact, it turned out that the securities could *not* by transferred by assignment under the Uniform Commercial Code as the auditors for the Louisiana Insurance Commission, Tr. 332-373 and the accounting firm of Deloitte Touche Tr. 539-615 had told Mr. Rush could be done. While the government called as witnesses the former attorneys who had worked for Presidential, as well as the statutory accountant who prepared the statements for Presidential, these witnesses supported the defendant's position. Ronald Hagan, Tr. 218-219, 221-223, 239, 244, 246-248, 249-250, 252-254, 269-270; Jennifer Matte, Tr. 314-317,319-320, 322; Mr. Walter Mann, Tr. 626-628, 644, 649-650, 659-657, 659-664, 666-669, 671-672, 683-685. Mr. Hagan and Ms. Matte explained the extensive efforts which were made by them and Mr. Rush to make sure that the securities that were being infused into the company by both Mr. Robichaux and Mr. McDermot were genuine. Mr. Mann confirmed the overall integrity of the operations at Presidential and the efforts which everyone made to see that all of the information contained on the statements made to the Insurance Commissioner were accurate.

The government called Larry Coleman, who was a certified financial examiner and who worked for the Louisiana Department of Insurance. He explained that he had been sent to check on the FNMA securities transferred from Robichaux to G.L.R. and ultimately into Presidential. He found that the transfers were valid and the manner in which they were done would have made Presidential a holder in due course under the Uniform Commercial Code. Tr. 352, 355, 359-360.

The government's next witness was Mr. Ken Dwyer

from the accounting firm of Deloitte Touche. Notwithstanding the approval by Mr. Coleman of the assignment of the securities, the Insurance Commissioner determined to send Deloitte Touche in to check on what had transpired. Mr. Dwyer found everything in order and believed that the transfers were valid under the Uniform Commercial Code and had Robichaux in fact owned the securities they would have accomplished exactly what Mr. Rush and the Insurance Commissioner had envisioned. He conceded that he later learned that he was incorrect in his understanding of how FNMAs had to be transferred and as of the time he knew that his advice to Mr. Rush and the Commissioner was incorrect. Tr. 548-549, 568-573, 577-581, 592. Mr. Dwyer testified that to check on the validity of the transfer, he traced the securities back from Robichaux to Mr. Kochensparger. Mr. Kochensparger was working in collusion with Mr. Robichaux and he sent a letter to Mr. Dwyer confirming that he was holding the FNMAs. Tr. 556-558. Mr. Kochensparger was indicted in the instant case and pleaded guilty for his participation with Robichaux. Vol. 2, p. 441.

Mr. Dwyer admitted that he had information in his file regarding the persons that he could contact to check on the proper method of transferring FNMAs. He failed to follow up by making those contacts and he conceded that had he done so he would have learned that a mere broker such as Mr. Kochensparger at Parson's Securities could not possibily have been a custodian of the FNMAs because only specially licensed governmental securities brokers could hold them. Tr. 577, 581. While Mr. Dwyer first claimed that it was Mr. Rush who put him in touch with Kochensparger he later admitted that in his conversation with the F.B.I. he simply assumed that Rush had done it because he was the "only person possible" that could have given him the information. Tr. 566, 567. However, Mr. Robichaux, himself, was working out of Presidential's offices, Tr. 316, and he was a very "possible" source.

The government called F.B.I. Special Agent Stephen

Hooker. Agent Hooker testified that he had gone through various of the records of Presidential and related companies of Gordon Rush and determined that certain funds had been taken out of the company for "personal" use by Gordon Rush. Tr. 697-748. Numerous items were identified ranging from condominiums to carpet cleaning services. Tr. 697-748. However, on cross examination he acknowledged that he had included a number of items as being "personal" even through they were owned by corporate entities. He stated that he justified doing this because of the fact that Gordon Rush owned all of the corporate entities in question. Tr. 748-749. The district judge called him down for such a completely unjustified conclusion and ordered the jury to disregard that remark. Tr. 749. When questioned on a number of specific expenditures which he had previously identified, Agent Hooker was not able to state whether they were business expenses or personal expenses. Tr. 750-752. He acknowledged that all of Mr. Rush's companies were operating out of the same location and he was able to determine what portions of the building or materials were being used by which different entities. Tr. 752-753.

Regarding the supposedly encumbbered Certificate of Deposit, the government called two witneses, Mr. Eugene Harris and Mr. Kermit Mogilles. Mr. Harris had no information regarding the loan, Tr. 118-122, and his only purpose was to produce the various bank documents that related to the loan. Tr. 91-122. Mr. Kermit Mogilles worked at Investors Bank during the time period in question and part of job was to review loans and make risk asessments. Tr. 123-124. He testified that he had questions about the adequacy of the security backing up the $1.4 million dollar loan, but when pressed on specifies he acknowledged that he did not handle the loan and did not do any independent checking on the worth of the borrower or the receivables in the company which stock had been pledged behind the loan, i.e. A & R Capital. Tr. 123-128. In fact he acknowledged that the bank had $1,578,475.00 in *excess* certificates which could have been used to further collateralize the loan if indeed the receivables due to A & R Capital together with Gordon Rush's personal

wealth were not sufficient. Tr. 132-137.

Mr. Harris and Mr. Mogilles identified various loan documents including a letter from the bank president to the bank attorney and the bank attorney's answer. This correspondence disclosed that the bank attorney was specifically asked for an opinion as to whether a pledge of the stock as between Gordon Rush and the bank would be contrary to a letter of safe keeping to the Insurance Commissioner representing that the stock was unencumbered. The letter from the bank attorney explained that the procedure was permissible and it would protect the bank as between it and Mr. rush, but as between it and the Insurance Commissioner the commissioner would "prime" the bank. Govt. Exh.'s. 203-223.

The government called as a witness Ms. Martha Hunt. She testified that she had worked for various of the Gordon Rush companies and while she was paid by Affiliated Employees, most of the work she did was for A & R Capital which later became Emerald Finance and Mortgage (A & R Capital/Emerald). That was the Rush company that did premium financing. It was her job to handle cancellation of policies. Tr. 789-791.

In September of 1989 when the F.B.I. conducted a search warrant at the offices of Presidential, Emerald, Affiliated, etc. they found a box containing a number of checks made out to various borrowers of A & R Capital/Emerald. Tr. 793. Ms. Hunt explained that when Lloyds of Louisiana Insurance Company went under all of the policies were canceled. Since A & R Capital had financed many of those premiums for Lloyds of Louisiana the borrowers were entitled to refunds. When LIGA sent to A & R Capital a number of returned premiums on Lloyds policies A & R Capital in turn owed a portion of those amounts to the borrowers.

Ms. Hunt stated that she and another employee by the name of Tammy Weller caused the refund checks to be made out to the borrowers, but they were never actually sent to the borrowers because Mr. Rush instructed her not to mail them out unles the borrower actually called up requesting

the refund. Tr. 795-799. Ms. Hunt then identified checks that were due to individual borrowers, specifically Kenneth Aguillard, Henry Griffin, Vanessa Jones, Christine McGee, Anne Young, Richard Paine, and Kirk Canova. Tr. 799-807.

Although Lloyds of Louisiana went under in April of 1986 the refunds were not sent by LIGA to A & R Capital/Emerald until two years later in 1988. Tr. 798. There was no testimony that the mails were ever used in furtherance of the alleged scheme to defraud. In fact, it was the government's theory of the fraud that the defendant Rush refused to allow the refunds to be mailed to the borrowers. Tr. 789-822.

Ms. Hunt acknowledged that when Lloyds of Louisiana first went under in 1986 that A & R Capital had been hired by LIGA to attempt to locate the various policy holders and had sent out a number of letters attempting to accomplish that goal. Tr. 819. Regarding the instructions that she supposedly got from Mr. Rush she testified that there was never any discussion involved, but simply a direction from him that no refunds be sent out unless the customer first called requesting the money. Tr. 819-821. There was absolutely no testimony that in any way referred to the co-dependant Peter McDermot although it was alleged that he was supposedly part of the scheme. The government then called the previously named borrowers who testified that their refunds were not sent to them and they would have liked to have had the money.

Gordon Rush testified in his own defense. Regarding the $1.4 million dollar loan that the government claime was encumbered Mr. Rush pointed out that he had more than adequate security for that loan. He was the sole owner of A & R Capital and he had over $2.5 million dollars in receivables and had previously borrowed from the same bank $1.5 million dollards against those receivables. In addition to the receivables A & R Capital also had over $60,000.00 worth of equipment and over $200,000.00 net worth of property. He further was protecting the bank by taking out a life insurance policy in the amount of $1.5 million dollars which

was payable to the bank. Tr. 884-889. The bank president, Mr. Russell Haas, explained to him that they would like additional security in the form of a pledge of the certificate of deposit. Mr. Rush had no problem with pledging the certificate as between him and the bank so long as it remained free and clear as to the Commissioner of Insurance, because that after all was the purpose for which he was borrowing the money. It was then that Mr. Haas wrote to the bank's attorney and got the opinion that what they had envisioned doing was feasible and would only encumber the C.D. as between the bank and Mr. Rush. As between the bank and the Commissioner of Insurance he would "prime" the bank. Those letters were introduced into evidence. Govt. Exh's 201, 202, 203, 207.

Mr. Russell Haas, the bank president was called as a defense witness as was Mr. Harry Stumpf, the bank's attorney. They both represented that the loan transaction was exactly as Mr. Rush had described it and that in fact the $1.5 million dollar C.D. was *not* encumbered as to the Insurance Commissioner and that the allegation to the contrary on page 3 of the indictment was not true. Tr. 888, 891; 1191-1214; 1261-1296. Mr. Rush further pointed out that the entire transaction, including the letter from the bank's attorney, was explained to the Insurance Commissioner and he was fully appraised of what was taking place. Tr. 892. The letter of safekeeping was sent to the Insurance Commissioner by Investors Bank, Exh. 207, and the loan was completely paid off in the early part of 1986. Tr. 894.

Regarding the allegation that he had supposedly infused false FNMA securities into Presidential through Ed Robichaux to hide the insolvency of the company, he pointed out that his deal with Robichaux did not even begin until 1989 and the company had been insolvent since the beginning of 1987. He explained that when he first went into business in 1985 President wrote automobile insurance which was a risky type of policy. Accordingly, he reinsured 100% of the policies he wrote. When the reinsurer, Insurance Exchange of America in Florida went under Presidential was insolvent. That was explained to the Insurance Commissioner

who allowed Presidential to stay in business as long as it could stay current in paying its claims. Tr. 898-901.

To work Presidential out of its problems Mr. Rush determined to move to a more profitable line of insurance and to infuse monies form his other companies to keep Presidential going. He did both of these things. He went to the Louisiana legislature and got it to approve a low risk "aggregate" policy that would replace the workmen's compensation requirement for the "mom and pop" operations. There was a great demand for this type of insurance and it proved to be very profitable. He also infused over $1.8 million dollars into Presidential from other companies of his. Tr. 905-918.

He knew that it would only be a matter of time before the larger companies saw how successful the "aggregate" line of insurance was and would come in and take over the market. It is for that reason be was looking for an influx of capital so that he could go public and write insurance on a national level. He therefore worked out the agreement with Ed Robichaux to accomplish the infusion of approximately $12 million dollars of FNMA's. He explained that with the ability to write policies on a ratio of four to one - i.e. $4.00 of insurance for every $1.00 of surplus capital - the arrangement with Robichaux was favorable to both of them. FNMA's were an amortizing asset and he could build up surplus in Presidential and at the same time pay Robichaux a greater return on the securities than the amount they earned in interest. If Ed Robichaux had actually owned the securities it would have been an advantageous arrangement for both of them. Tr. 918-944. The entire transaction was divulged to the Commissioner of Insurance who sent in both Mr. Coleman and Mr. Dwyer. When they both approved the ownership and method of transfer of the securities he had no reason to doubt the legitimacy of what Mr. Robichaux had represented. Tr. 928-937.

When he was ultimately advised by the F.B.I. that Robichaux did not in fact own the securities, Mr. Rush immediately took them off his financial statement and notified the Insurance Commissioner. Tr. 952. After the problems

with Mr. Robichaux it became clear to Mr. Rush that he was in over his head and it was in his best interest to sell Presidential. He was put in touch with Mr. McDermot by a broker and he did everything in his power to check out Mr. McDermot to make sure that he was legitimate. He hired a private investigator to check on Mr. McDermot's background and he sent Presidential's attorney, Mr. Ron Hagan out to meet with him and review his operations. Mr. McDermot appeared to be legitimate and capable of buying Presidential as he had proposed to do. Mr. Rush even went to Las Vagas himself to meet with Mr. McDermot and personally check him out. It was at that time that Mr. Rush discovered that some of the Cusip numbers on the FNMAs which McDermot proposed to invest in Presidential were the same numbers that Robichaux had had on some of the FNMAs that it turned out he did not own. This was the "coincidence" that led to the government indicting Mr. Rush.

However, at the time this was discovered Mr. McDermot had a legitimate explanation as to how Mr. Robichaux could have gotten access to the numbers of his FNMA securities. He further was able to produce his income tax return and show where he had paid income taxes on the FNMAs in question. Most importantly Mr. Rush pointed out to Mr. McDermot that the F.B.I. was actively investigating insurance companies in Louisiana and Mr. Robichaux had been indicted on those very securities. He could not believe that under those circumstances Mr. McDermot would have gone forward with the transaction if in fact he did not own the FNMAs. Of course, it was also pointed out to Mr. McDermot that the securities would have to be reviewed and approved by Louisiana Department of Insurance. Mr. McDermot assured him that there were no problems with the securities and further assured him that in the event any question came up regarding the FNMAs there would by a right to substitute other securities. Tr. 947-965.

Additionally, Mr. Rush hired an outside attorney, Mr. Joseph McMahon, who was formerly an Assistant United States Attorney and Chief of the Criminal Division in the

Eastern District of Louisiana. He asked Mr. McMahon to check on the ownership of the questioned FNMAs. Like Ms. Matte, Mr. Coleman, and Mr. Dwyer, Mr. McMahon discovered that while you could verify the existence of the FNMAs by the Cusip numbers you could not ascertain the ownership of the securities. Nevertheless he personally met with Mr. McDermot and confronted him with the realities of the F.B.I. investigation of insurance companies in Louisiana and how foolhardy it would be for Mr. McDermot to press forward attempting to buy Presidential with any securities which he did not legitimately own. He also was assured by Mr. McDermot regarding the ownership of the securities and the legitimacy of his attempts to buy Presidential. Tr. 965-966. Mr. McMahon testified as a defense witness and confirmed Mr. Rush's testimony. Tr. 1228-1256.

Regarding the transaction with Insurance Commissioner Douglas Green, Mr. Rush pointed out that this was an arms length transaction and he was making a loan that was secured by good collateral. Subsequent testimony by Mr. Rush's bookkeeper, Ms. Deborah Munch and the company's attorney, Mr. Ron Hagan disclosed that he had told them to handle the loan in a completely proper and businesslike manner. While it is true that they had slipped up and failed to get the mortgage recorded so as to protect the loan, they testified that that was in no way the fault of Mr. Rush. He had told them to handle it properly. Tr. 1169-1172.

Regarding the LIGA refunds about which Ms Hunt claimed Mr. Rush had told her not to mail out unless the borrower called up asking for the money, he explained that that simply was not correct. While he did not believe that Ms. Hunt was knowingly testifying falsely, he did believe she had misunderstood his instructions. He explained that when Lloyds of Louisiana had originally gone under in 1986, LIGA had hired his company to attempt to find the approximate 7500 policyholders who were due refunds. The ones that they could find were of course paid. When LIGA unilaterally sent the remaining refunds to A & R Capital/Emerald two years later in 1988 he felt that there was no chance of locating

the policyholders then that they could not locate two years earlier when they had tried. He instructed Ms. Hunt that *if* a policyholder called seeking a refund she should notify him. He explained that there were return brokerage commissions that were owed to LIGA and he would have had to have made those determinations before sending out the refunds. Mr. Rush was able to show the various errors in the checks which Ms. Hunt had prepared demonstrating why he would have had to have reviewed them. Tr. 998-1003.

The defense called as additional witnesses Ms. Marilyn Stringer, Diana Lee Bullock, and Lynne Paulina. They had worked for Mr. Rush's various companies for a number of years and it was their responsibility to generate the computer information that would supply data to the statutory accountant Mr. Walter Mann, and would generate information regarding refunds that were due. They all testified that throughout the years they had worked for Mr. Rush they had always produced accurate information and caused refunds to be made to any policy holders or borrowers to whom they were due. Mr. Rush never instructed them or ever even suffested to them that they should generate any information that was not correct or fail to make any refunds that were due. Tr. 1301-1315.

REASONS FOR GRANTING THE WRIT

I. ARGUMENT

A. *Introduction*

Thirty years ago this Court decided in the case of *Singer v. United States,* 380 U.S. 24, 85 S.Ct. 783 (1965) that jury trials were the presumed method for disposing of criminal cases in federal courts and a defendant did not have an absolute right to waive the jury. However, the Court left opened the possibility that in the proper circumstances a jury trial could be waived by a defendant even in the face of an objection by the government.

> Petitioner argues that there might arise situations where 'passion, prejudice, . . . public feelings' or some other factor may render impossible or unlikely an im-

> partial trial by jury. However, since petitioner gave no reason for wanting to forego jury trial other than to save time, this is not such a case and petitioner does not claim that it is. *Ibis.* at 37-38.

In the years that have passed since the *Singer* decision the government has brought ever increasingly complex "white collar" prosecutions. In this writ application the defense asks the Court to determine the constitutional issue of whether a criminal case can be so factually and legally complex as to be beyond the capabilities of a jury, and hence the defendant has a right to waive the jury lest he be denied his right to due process and a fair trial.

Petitioner additionally raises a separate but related issue regarding the interpretation of Rule 7(c) of the Federal Rules of Criminal Procedure. That rule requires that an indictment contain a "plain, concise, and definite written atatement" of the charges against the defendant. While this Court has had many occasions to examine the constitutional dimensions of a criminal indictment it has never considered the much more narrow restrictions imposed by Rule 7(c). Also as a part of the phenomenon of white collar prosecutions there has developed over the last few decades the lengthy complex indictment which the district court in this case described as being burdened with argument and editorial comments. These prolix argumentative documents are being sent with the jurors when they go to deliberate. The defense will demonstrate that these type of indictments are in clear violation of Rule 7(c) and the practice of using them should be examined by this Court.

B. ***Was The Trial Court In Error When It Ruled That The Defendant Rush Did Not Have A Constitutional Right To Waive The Jury Over The Government's Objection Notwithstanding The Complexities Of the Factual And Legal Issues Involved, And Did The Appellate Court Err In Upholding That Ruling?***

The defense acknowledges that jury trials are the presumed method of determining guilt or innocence in federal criminal prosecutions. Under ordinary circumstances the defendant may only waive a jury trial with the consent of the government. Fed.R.Crim.P. 23(a). Further, the defense recognizes that simply because a case presents complex legal and/or factual issues does not constitute a *per se* constitutional right for the defendant to waive a jury trial. Rather, the issue presented for the Court's consideration is whether there can ever be a situation in which the factual and legal issues to be determined are so complex, convoluted, and esoteric that they would simply be beyond the ability of lay jurors to comprehend. If so, would it not be a violation of the defendant's Sixth Amendment right to a fair trial to deny him the choice of waiving a jury trial and be tried by the judge alone? If the first two inquiries are answered in the affirmative, then it must be determined whether those extreme circumstances were extant in the present case so that the defendant was denied his right to a fair trial when the district court refused to allow the jury waiver over the government's objection.

This Court can see that the Fifth Circuit Court of Appeals side-stepped the issue when the panel simply chose to give what the defense suggests is an artificially narrow view of the language in the *Singer* decision. The court of appeals stated:

> This language [from the *Singer* decision] makes clear that the Court specifically reserved the question of whether a jury trial could amount to a denial of a defendant's right to an *impartial* trial. The Court's emphasis on impartiality conforms with its definition of the criminal defendant's right: 'A defendant's only constitutional right concerning the method of trial is to an *impartial* trial by jury.' *Id.* at 36, 85 S.Ct. at 790 (Emphasis added).
>
> Rush does not challenge the impartiality of his trial. Rather, he argues only that a jury was incapable of understanding the issues in his case. As Rush and McDermot have not alleged a violation of their due pro-

cess required a bench trial in this case.

United States v. Rush, 5th Cir. Opinion No. 93-3603, pp. 7-8. (Emphasis the Court's.)

While it is true that the concept of impartiality can relate to issues such as bias and prejudice it is not so limited. Indeed *Webster's New World Dictionary*, 2d.Ed., discloses that the term "fair" is a synonym for "impartial". In fact, if this Court had wanted to limit its holding to jurors who were simply biased it would have had no reason to have added the words "or some other factor" because "passion, prejudice, . . . public feelings" had already been specifically mentioned in the same sentence. It is obvious that the Court was concerned about any other factor that might possibly impact a jury's ability to be fair. It is after all a fair trial that is guaranteed by the Constitution. It is foolish to suggest that this Court would allow an unfair trial by jury as long as the unfairness did not emanate from either passion, prejudice or public feelings. Stated another way, if the jury was "incapable of understanding the issues" the defendant did not receive a fair/impartial trial.

In fact, the defense was able to cite two reported decisions where jury trials were waived over the objection of the government for the exact reasons urged by petitioner in the instant case. For example, in the case of *United States v. Panteleakis*, 422 F.Supp. 247 (D.R.I. 1976) the court while noting that simply because a case was complicated and therefore might not be "... correctly understood by a jury is not, in and of itself, sufficient reason to circumvent a jury trial. . ." nevertheless granted the motion to waive the jury because of a number of overlapping issues, the totality of which prevented the defendants from getting a fair trial by a jury.

> The court feels that this is the kind of case where "the practical and human limitations of [a] jury . . . cannot be ingnored," because of the context within which the evidence must be presented. This case indeed presents that "other factor . . . render[ing] unlikely an impartial

trial by jury". *Ibid.* at 249-250.

The *Penteleakis* case, like the present case, was a multi-defendant, multi-count indictment alleging fraud. It also was a "document case" in which many exhibits would have to be introduced into evidence .

Another case where the court ruled that a jury had to be waived over the objection of the government was *United States v. Braunstein*, 471 F.Supp. 1 (D.N.J. 1979). In that case the issue was Medicaid fraud and the court noted:

> The difference between Medicare and Medicaid means that the trial here will involve state law, as well as federal law, thus adding another layer of complicated and different accounting rules. * * * Rulings on evidence, with five separate defendants, would carry heavy risk that the jury would hold against one defendant evidence admissible only as to another. Taken in light of all the circumstances, each defendant would be most unlikely to have fair assuarnce that a jury could consider each charge against that defendant independently of the verdict in respect to other charges or against other defendants. * * * The risk of prejudice to a fair trial is extremely high and compelling. *Ibid.* at 13-14.

While the defense recognizes that the above cited cases are district court decisions that were not binding as precedent they nevertheless gave clear and compelling reasons and they were both based upon the "other factor" language left open by this Court in the *Singer* decision.

Again, the parallels to the present case are strong. It is the state laws which regulate the inusrance industry. Not only did those laws have to be superimposed on the federal mail fraud statute, there was the additional complexity regarding the nature of the securities in question. The indictment alleged that there were FNMAs and GNMAs that were shown as surplus capital on the financial statements, but were not in fact "owned"by the defendant. That issue brought into play not only applicable federal and state laws and

regulations, but also issues regarding what were accepted practices within the insurance industry, accounting principles, statutory accounting, the Uniform Commercial Code, and securities law. The totality of those issues was simply beyond the ability of the jury to understand.

As our society becomes more complex and the actions of citizens are judged in the context of a panoply of sophisticated and interrelated laws, rules, and regulations, there reaches a point at which it must be recognized that lay persons no matter how well-intentional are simply incapable of ascertaining whether a given defendant's conduct comported with the applicable standards. See Generally, Kurland, *Providing a Federal Criminal Defendant With A Unilateral Right To A Bench Trial: A Renewed Call To Amend Federal Rule Of Criminal Procedure 23(A),* 26 U.C. Davis L. Rev. 309 (1993). That being true it must necessarily follow that there is a constitutional fair trial/due process right to be tried by the court alone under certain extreme and limited circumstances. While there can be no bright line that clearly delineates when such a waiver must be allowed there can be little doubt but that if the right exists the factual and legal issues inherent in the present case mandate that the defendant should have been afforded a judge trial. If one were to sit down and make up a hypothetical fact scenario that would constitutionally qualify for a bench trial it would be difficult to exceed the complexity of this case.

The complex nature of the indictment foreshadowed what was to take place at the time of trial. The first two pages of the indictment, in paragraphs A(1-6) identify 12 different companies. The government's list of evidence discloed that it intended to produce numerous documents relative to each of these entities. A(7) identified the Louisiana Insurance Guaranty Association which brought before the fact finder the issue of its legal responsibilities and operating policies. A(8) identified the accounting firm of Touche, Ross and the fact finder had to understand the functions and responsibilities of independent auditors.

Paragraph A(10) identified the Federal National Mor-

tgage Association (FNMA). These security devices are regulated by a combination of both federal and state law. The heart of the government's case was that these security devices were not "owned" by the defendant Rush and/or his corporations. The question of whether FNMAs need by owned, or whether they can be assigned, could only be determined by an analysis of federal law, state law, the Uniform Commercial Code and accepted insurance practices. A(11) identified Government National Mortgage Association (GNMA) securities and the issues inherent in these security devices were similar to those described above regarding the FNMAs, but just different enough to add another layer of confusion.

Paragraph B(1-3) raised the issue of whether the financial statement of Presidential disclosed a certificate of deposit as being free of any incumbrance, and if so, whether that representation was true. Intertwined with that issue was whether there were any encumbrances on the certificate which raised further questions of security and banking laws and regulations. Overlapping both of those issues was the question of whether or not the letter sent to the Louisiana Commissioner of Insurance in fact contained any misrepresentations. That presented the additional questions of the legal responsibilities of the Louisiana Office of Insurance Commissioner and fiduciary obligations of banking officers.

Paragraph B(1-4) alleged a fraudulent "paper transaction" of FNMAs. The indictment claimed that Robichaux - an unindicted co-conspirator - conspired with Rush to show a capital surplus of FNMAs that were in fact not to transfer. Robichaux had already been found guilty for his activities in that regard and the issue in this case was whether the defendant Rush was a knowing participant in what Robichaux did. The government did not call Robichaux as a witness and therefore the hearsay problems inherent the evaluating the activities of an unindicted co-conspirator were before the jury.

C-Count 9(A)(1) alleged as an overt act that defendant Rush "caused" an officer of Investors Bank to mail a letter

to the Louisiana Commissioner of Insurance verifying the existence of a 1.4 million dollar certificate of deposit which was unencumbered when the officer of the bank "knew" that the CD was in fact security for another loan. In response to a bill of particulars the government stated that the banker was an unindicted co-conspirator and hence raised all of the evidentiary problems inherent in that status.

C-Count 9(A)(3) alleged false entries on financial statements. Evaluating a financial statement by an insurance company prepared under statutory accounting principles designed for submission to insurance commissioners was beyond the acumen of lay jurors.

C-Count 10(A)(3) alleged as an overt act that a statement sent to the Texas State Board of Insurance failed to properly identify the distinction between two corporate entities. The status of closely held corporations and the "distinction" between them for purposes of insurance commissions was not a matter that court be properly evaluated by lay persons.

C-Count 11 (A)(4) alleged that defendants Rush and McDermot continued to issue insurance policies when they knew that Presidential was "financially impaired". To determine whether an insurance company is financially imparied required not just the ability to read a complex statutory accounting financial statement, but also to evaluate the concept of "incurred but not reported" insurance claims against the company. This was another issue far beyond the ability of untrained lay persons.

Any one of the above described issues could possibly be understood and handled by a jury if enough testimony, including that of experts, was given. However, the totality of all of the legal and factual issues was simply more than a jury of lay persons was capable of understanding. Accordingly, the district court should have granted the defendant Rush's motion to waive the jury even if there was an objection by the government.

The actual presentation of the evidence substantiated

the difficulities which the defense had predicted in moving to waive the jury. The defense recognizes that in evaluating writ applications this Court does not have the time or resources to read the entire transcript of a trial that took two weeks, but it does request that the Court at least review limited portions of the transcript which were made part of the record excerpts in the appellate court and are attached here as part of the appendix. When it is seen how convoluted and legally esoteric the testimony was on issues such as securities trnasactions, FNMA and GNMA assignments, Uniform Commercial Code transfers, etc. it will quickly be seen that these issues were simply beyond the pale of a lay person to comprehend.

If there be any doubt regarding what the defense is suggesting the Court need look no further than the comments of the district court judge who was required to review portions of the transcript of the trial after the death of the trial judge. In response to the government's contention that the case was not really that complicated the district court stated: "I hereby make an affirmative finding that this is, in fact, *complicated* and I find it hard to believe that any one thoroughly familiar with it could seriously make any representations to the contrary. Vol. 5, pp. 1209-1210. (Emphasis the court's.)

The defense stresses that it is not simply a question of complexity *vel non*. Quite often fraud can take place in the context of a business setting in which the complexities are beyond the acumen of the average juror, but those complexities are unrelated to the fraud which is alleged. Not so in the present case. The defendant maintained that he was not a knowing participant in the conduct of Robichaux and McDermot, and to the contrary was able to be victimized by the very intricacies of which he now complains. However, the jury did not have the ability to properly analyze that defense.

For example, when the defendant stated that he thought assets had been validly transferred into his company by means of a Uniform Commercial Code assignment, and

the government experts testified that such assignments were not permissible and would have had to have been accomplished on Treasury forms, how was a jury to determine whether his position was reasonable? What is a UCC-1 assignment How does it work? What is a holder in due course? Was it reasonable for the defendant to have first transferred the securities into GLR, Inc. so that the subsequent transfer to Presidential protected that company as a holder in due course? Was the "side agreement" between Robichaux and GLR, Inc. simply a security device that was legitimately designed to make Presidential a holder in due course, or did it carry with it all of the sinister connotations suggested by the government? These are questions which could easily be understood by a judge, but were impossible for a jury to fathom.

Lest the government suggests that these are issues that could be clarified by expert witnesses the defense once again refers the Court to the testimony of the bank's attorney Harry Stumpf. He was an expert in securities law and attempted to explain to the jury how a certificate of deposit can be encumbered as between Rush and the bank, yet be unencumbered as between the bank and the Insurance Commissioner to whom the bank had represented the certificate was being held in safe keeping. The Court could readily appreciate how the Insurance Commissioner could "prime" the bank as regards the C.D. and yet the bank would still be protected as between it and Mr. Rush. Yet anyone reading the testimony of Mr. Stumpf would quickly recognize that it is a cruel fiction to believe that the jury had any ability to understand those distinctions. The same judge who declined to allow the defense to waive the jury, commented as to how "muddy" the waters had gotten,[1] while the prosecutor commented that he was getting ready to throw more "dirt" in those waters. Tr. 1212.

Likewise is the testimony regarding statutory accounting. If the writ is granted the court will be able to see from

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[1] Other instances in which the Court complains about the case being confusing can be found throughout the record. E.G.Tr. 451; 874-877; 1208.

the transcript that the government called Mr. Walter Mann and established that he was the statutory accountant for Presidential and all of the entries he made were in accordance with the standards set forth by the National Association of Insurance Commissioners. Yet when the prosecutors cross-examined Mr. Rush on entries in Presidential's financial statements, which the government deemed to be inaccurate, they reacted with incredulity when he explained that he was not able to understand the reports because the entries were made under principles of statutory accounting with which he was not familiar. TR. 1050-1051. The government confronted him with the fact that he had taken accounting in college thereby implying to the jury that he was not being truthful. Tr. 1139-1140. Once again the court would be in a position to understand that the statutory accounting principles differed basically from regular accounting and the distinction being made by Mr. Rush was reasonable. There is no way that a jury of lay persons could be expected to understand those differences.

C. *Did The Trial Court Err In Failing To Dismiss The Indictment For Violation Of Rule 7(c) Of the Federal Rules Of Criminal Procedure Requiring That It Be Plain, Concise And Definite, And Did The Appellate Court Err In Upholding That Ruling?*

As noted in the introduction this Court has never directly visited the issue of the requirements under Rule 7(c) of the Federal Rules of Criminal Procedure that an indictment be a plain, concise, definite written statement. This court and the appellate courts have tended to merge the requirements under that rule with the constitutional standards. Yet in the lower courts petitioner conceded that the indictment was constitutionally valid; it simply was not plain and concise as required by statute. The appellate court once again sought to avoid the issue, this time on the basis of a procedural ground never urged by the government.

The appellate court stated:

> Rush cites no authority in support of his position, and he ignores the ample authority clarifying that a defendant's remedy in the face of a needlessly wordy indictment is a motion to strike surplusage under rule 7(d). See 1 Wright, *Federal Practice and Procedure,* §127, at 424-27.

United States v. Rush, 5th Cir. Opinion No. 93-3603, p.11.

Petitioner has no problem with the general proposition that if an indictment merely contains language which is surplus that a defendant's remedy is not to have the indictment dismissed, but rather to file a motion to strike the surplusage pursuant to the provisions of Rule 7(d) of the Federal Rules of Criminal Procedure. However, that was not the situation in the present case. Indeed, the Fifth Circuit Court of Appeals in its opinion specifically addressed the distinction when it noted:

> Rush's counsel explained at oral argument that he did not move to strike the unnecessary language because he could not identify any specific language that could be deleted while still leaving a viable indictment. *Ibid.*

After noting the defendant's position the court of appeals did not even analyze it, much less explain why it was incorrect.

A review of the indictment will disclose that it does not lend itself to being corrected by simply deleting portions of it that are not needed. It is flawed throughout and the problems are woven into the very fabric of the document. If all of the offensive argumentive portions were deleted that would certainly make the indictment more concise, but it would no longer be definite. By definition what is surplus is extra, not needed. Webster's New World Dictionary, 2nd Ed., defines surplusage as "irrelevant or superflous words or matter." Black's Law Dictionary defines surplusage in pleadings as "allegations of matter wholly foreign and impertinent to the cause...any allegation without which the pleading would yet be adequate." The Court will see from a review of the

indictment that it does not have the type extra or surplus language that could be deleted and still leave the pleadings adequate. What the prosecution did in the instant case was to allege the scheme in such a lengthy manner as to violate the concise requirement of Rule 7(c), but not lend itself to correction under Rule 7(d).

The appellate court denied the defendant Rush's motion to dismiss the indictment under Rule 7(c) because he "...cites no authority in support of his position...." *Ibid.*. While it is true that appellant found no case law supporting his position it is equally correct that he found no case law opposing it. The courts have simply never examined the problem. Indeed this Court in the cases of *United States v. Debrow,* 346 U.S. 375, 74 S.Ct. 113 (1953) and *Russell v. United States,* 369 U.S. 749, 82 S.Ct. 1038 (1961) addressed the requirements under Rule 7(c) solely from the point of view of whether the indictments in question sufficiently apprised the defendant of what he must be prepared to meet at trial and to protect himself in the event of a plea of former acquittal or conviction. Both of those decisions cite as authority previous cases dealing with the constitutional requirements. It will be found that the appellate court decisions have handled Rule 7(c) the same way. E.g. *United States v. Rosi,* 27 F.3d 409 (9th Cir. 1994); *United States v. Shirk,* 981 F.2d 1382 (3rd Cir. 1992); *United States v. Olatunsi,* 872 F.2d 1161 (3rd Cir. 1989); *United States v. Silverman,* 745 F.2d 1386 (11th Cir. 1984); *United States v. Webb,* 747 F.2d 278 (5th Cir. 1984); *United States v. Chaney,* 964 F.2d 437 (5th Cir. 1992); *United States v. Edrington,* 726 F.2d 1029 (5th Cir. 1984) and *United States v. Gordon,* 780 F.2d 1165 (5th Cir. 1986).

No courts have sought to analyze the axiomatic proposition that Congress can legislate more stringent requirements for an indictment than those mandated by the Constitution. That is precisely what Rule 7(c) attempted to do when it required that an indictment be concise. The trial court declined to dismiss the indictment citing lack of appellate guidance. When the defendant Rush brought the issue before the court of appeals it denied relief in part because the appellant was supposedly unable to offer any authority in support of

his position. However, petitioner suggests that when he is able to cite a specific codal article, such as Rule 7(c), and can further demonstrate a problem which is addressed by that rule that that is ample "authority" to at least justify an analysis of the problem.

The district court clearly identified the mischief that is sought to be corrected in this writ application.

> The government creates difficulty when it seeks to recast the traditional form of indictment from a vehicle for stating the offense into a vehicle for arguing its case. The indictment will be read to the jury at trial and will be available for study (and presumably studied) by the jury during deliberations. Thus, the jury will carry into the jury room the government's version of the case -- in effect, the government's written oral argument in support of the alleged individual criminal acts. Pretermitting that a defendant does not have the same opportunity, it would seem such arguments are more properly left for trial.
>
> The Court notes with concern that such narratives have become common practice and apparently have not been discouraged by the appellate courts. This Court, however, articulates its concern about such narratives because they can, on occasion, confuse the jury and provide the government an unfair advantage during trial deliberations. Vol. III, pp. 815-816.

The trial judge was correct in his observations and it appeared from the ruling that the only reason for not dismissing the indictment was the court's belief that there was no legal authority for doing so. As previously noted Rule 7(c) covers exactly the situation that was troubling the trial judge. It is clear from the Appendix to Forms for Rule 7 that the type of indictments currently being employed by the government are not permissible. The most recent editions of the Federal Rules of Criminal Procedure do not still contain the appendix, but the reporter's note shows that they were abrogated not because they were no longer applicable but

rather because their content was well known to the Justice Department and the courts, and accordingly it served no useful purpose to continue to publish them as an appendix to the rule. Copies are attached as part of petitioner's appendix for the Court's ready reference.

They disclose the vast differences between what was envisioned and required by Rule 7(c) and what the government is routinely using in its current indictments. This is an illegal and prejudicial trend that should not be tolerated by this Court. The government started with a fact situation that would baffle a law professor and then chose to allege those facts in a complex and argumentative indictment, interwoven with the suggestion that the Louisiana Insurance Commissioner was bribed, but no specific allegation or charge[2]. Such indictments are prohibited under Rule 7(c) and if there were ever a situation in which the violation of the rule constituted reversible error it is in the present case.

The government in its response to the court of appeals tried to portray itself as being impaled on the horns of a dilemma because if its indictments are not detailed enough the defendant is not sufficiently informed of the charges against him, and cannot adequately object at the time of trial; on the other hand if it details the alleged offense it is accused of being too lengthy. No such dilemma exists.

The requirements under Rule 7(c) that an indictment be plain, concise and definite fit perfectly with the provisions of Rule 7(f) which provide for the defendant's right to receive by way of bill of particulars the specific information which he needs to adequately prepare his defense and object at trial. On the other hand a bill of particulars is not read to the jury and the jurors do not get to take it with them during their deliberations. Hence, that would obviate the problem which the district court found regarding the indictment in the

---

[2] The government well knew that Presidential's insolvency was understood by the Insurance Commissioner's office and it was nevertheless allowed to operate. To get around this problem it undermined the defendant's position by suggesting, but not charging, bribery of the Commissioner.

present case containing over 25% argument and editorialization.

In support of its position the government quoted with great flourish the following language, "The indictment is prolix, but that is not fatal." The problem with that quote is that it is from the case of *United States v. Olmstead,* 5 F.2d 712, 715 (W.D. Wash 1925) that predates by over twenty years the enactment of the Federal Rules of Criminal Procedure which require that an indictment be concise. The defense once again respectfully calls the court's attention to the attached Appendix of Forms and particularly Form no. 3 which is a sample form indictment for mail fraud. It will be seen that the redactors of the Rules not only put in the requirement that an indictment be concise, but they also specifically attached forms demonstrating what was envisioned by that requirement. The Court will see that that sample mail fraud indictment relates to stock fraud regarding a gold mine. It was confected in two short paragraph. There is no doubt but that the particulars of such an offense could be expanded to consume 12 pages, as did the allegations in Count 1 of the instant case. The only problem then would be that it would not be concise and would be in violation of the law. That is precisely the problem with the indictment brought against the defendant Rush, and that is why it should have been dismissed.

In that regard, petitioner asks the Court to view this problem in context with the jury waiver issue. Confusion abounded in the district court.[3] If the defendant was not going to be allowed to waive the jury at very least he should have been spared from the over length, argumentive indictment with which he was confronted. Such indictments have insidiously creeped into the federal judicial system almost without notice. The government blithely responds that complex crimes require complex indictments. That really is not so, but no court has taken the time to closely scrutinize that bromide. The press release/editorial/closing argument/indict-

[3] Even in his jury instructions the trial judge kept saying how confusing the issues were. Tr. 1659, 1670.

ments are extremely prejudicial and specifically prohibited by Rule 7(c). Experienced trial judges such as George Arceneaux have watched their encroachment, and in this case he had the courage to speak out against what was happening. While he did not dismiss the indictment, he did specifically address his disappointment in the lack of appellate court guidance on the issue. The Fifth Circuit side stepped the issue. This is an important rule that deserves this Court's close scrutiny.

CONCLUSION

Petitioner recognizes that few requests for review are granted by the Court and hardly any at the urging of individual criminal defendants. Yet there are instances where it is the criminal defense bar which is in the best position to bring to the Court's attention troubling developments that otherwise might go unnoticed. While both of the issues presented in this application are serious and have wide ranging implications regarding the search for justice no drastic remedies are being sought. Certainly no malefactor is likely to escape conviction by opting for a judge trial. Yet in the limited circumstances when a defendant should be afforded that choice it is quite likely that the innocent accused would be properly protected by the trial judge. Likewise, if the Court enforces Rule 7(c) to require that criminal charges be concise, and that elaboration on the charges be accomplished by a bill of particulars as envisioned by the Code, no harm will be done to legitimate prosecutions. Yet the harm inherent in the complex argumentative indictments will be eliminated.

Respectfully submitted,

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Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1995

GORDON L. RUSH, JR.,

Petitioner

VERSUS

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX

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96

APPENDIX TABLE OF CONTENTS

Index to Appendices

APPENDIX:

A) Opinion for the United States Court of Appeals for the Fifth Circuit.....A-1

B) Second Superseding Indictment for Conspiracy, Mail Fraud and Wire Fraud.....A-30

C) Judgment of the United States Court of Appeals for the Fifth Circuit.....A-49

D) Denial of Petition for Rehearing.....A-51

E) Appendix of Forms - Form 3, Indictment for Mail Fraud.....A-53

F) Amendment VI.....A-64

G) Rule 23(a).....A-65

H) Amendment XIV, Section 1.....A-66

I) Rule 7(c)(1).....A-67

J Excerpts of Trial Testimony.....A-68

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

FILED
JUN 05 1995

No. 93-3603

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
Cross-Appellant,

versus

PETER McDERMOT, II and
GORDON L. RUSH, JR.,

Defendants-Appellants,
Cross-Appellees,

STEVEN W. KOCHENSPARGER,

Defendant-Appellee.

Appeals from the United States District Court
For the Eastern District of Louisiana
(CR-92-218-LLM)

Before WISDOM, JONES, and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA,Circuit Judge:*

Gordon L. Rush, Jr., appeals from his convictions and sentence for multiple counts of mail fraud, wire fraud, and conspiracy to commit mail and wire fraud. Peter McDermot II appeals from his conviction and sentence for two counts of wire fraud and one count of conspiracy to commit mail and wire fraud. The United States cross-appeals from the district court's sentencing determinations for Rush and McDermot and appeals from the court's sentencing determination for Steven Kochensparger. We affirm Rush's conviction , we vacate and remand Rush's sentence, we affirm Kochensparger's sentence, and we dismiss McDermot's appeal.

I

A federal grand jury indicted Rush, McDermot, and Kochensparger in connection with their roles in the failure of Rush's insurance company, Presidential Fire & Casualty Company ("Presidential"). The indictment contained twenty-one counts of conspiracy, mail fraud, and wire fraud. After Rush and McDermot filed motions attacking the in-

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

dictment, the grand jury returned a superseding indictment.[1] In it, the grand jury alleged two schemes to defraud. Counts 1 through 11 related to the first scheme, while counts 12 through 19 related to the second scheme.

As alleged in the superseding indictment, the first of the two schemes consisted of an attempt to defraud the Louisiana Insurance Guaranty Association ("LIGA"); [2] the accounting firm of Touche, Ross; the citizens of Louisiana, Mississippi, and Texas; and the claimants and policyholders of Presidential. The alleged object of the scheme was to "place fraudulent assets on Presidential's financial statements in order to allow the company to continue to operate and to provide money for the defendants' personal use." The indictment further alleged four "ways and means" that the defendants used to accomplish the scheme: (a) the false representation to the Louisiana Department of Insurance that Presidential's start-up capital was unencumbered; (b) the infusion into Presidential of approximately $13 million in fraudulent government securities, specifically Federal National Mortgage Association certificates ("FNMA's") and Government National Mortgage Association certificates ("GNMA's"); (c) the infusion into Presidential of $9 million in fraudulent FNMA's and municipal bonds; and (d) the diversion of corporate funds from Presidential and other companies operated by Rush, including a premium financing company called A & R Capital Corporation ("A & R").

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[1] Before the grand jury returned the superseding indictment, Kochensparger pled guilty to Count 1 of the original indictment, which charged him with conspiracy to commit mail and wire fraud.

[2] LIGA guarantees the policies of Louisiana citizens in the event an insurer becomes insolvent.

In Counts 1 through 11, the Grand Jury alleged three mailings, five wire transmissions, and three conspiracies to commit mail and wire fraud in furtherance of the first scheme to defraud. Each of these eleven counts named Rush, and two of the wire fraud counts and one of the conspiracy counts named McDermot as a defendant.

The second fraudulent scheme consisted of an attempt by Rush to defraud policy holders of Lloyds of Louisiana who had financed their premiums with his premium financing company, A & R.[3] As alleged in the indictment, when Lloyds of Louisiana failed, Rush obtained refunds from LIGA, on behalf of A & R customers, of their unused premiums, and rather than remit the refunds to the customers, he wrongfully retained and diverted the funds. Counts 12 through 19 alleged eight specific refunds mailed to A & R from LIGA in furtherance of Rush's scheme.

Rush moved to dismiss the superseding indictment as duplicitous, and, in the alternative, to "sever" the first alleged scheme into two schemes. He also moved to strike as surplusage allegations of losses to the citizens of Louisiana. The district court denied Rush's motion to dismiss and granted his motion to strike. Rush later filed second motion to dismiss the indictment on the grounds that it was not concise, but the district court denied the motion.

Also prior to trial, Rush and McDermot waived their right to a jury trial under Rule 23(a) of the Federal Rules

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[3] A & R's financing arrangement allowed purchasers of Lloyds of Louisiana automobile insurance policies to pay their premiums in installments. We describe this arrangement *infra*, in part II.D.

of Criminal Procedure and moved to be tried by a judge alone. Because the government declined to consent to Rush and McDermot's waiver, the district court denied their motions. At the end of a two-week jury trial, Rush and McDermot moved for acquittal, and the court took their motions under submission. The jury then returned guilty verdicts on all counts against Rush and on three counts against McDermot.

After the trial, but before Rush, McDermot, and Kochensparger's sentencing, Judge Arceneaux, who had presided over the trial and the pre-trial proceedings, passed away. When the case was subsequently transferred to Judge Mitchell, Rush moved for a new trial on the grounds that Judge Mitchell would be unable to decide Rush's motion for acquittal or impose Rush's sentence without having presided over Rush's trial. After reviewing the trial record, Judge Mitchell denied Rush's motion for a new trial and motion for acquittal.

After conducting a hearing and reviewing extensive memoranda filed by the parties, the district court sentenced Rush to a forty-six-month term of imprisonment, a $25,000 fine, a $950 special assessment, and a three-year term of supervised release. The court sentenced McDermot to a forty-one-month term of imprisonment, a $7,500 fine, a $150 special assessment, and a three-year term of supervised release. The court sentenced Kochensparger to a six-month term of imprisonment, a $4,000 fine, and $50 special assessment, and a three-year term of supervised release.

Rush and McDermot[4] appeal from their convictions

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[4] McDermot's brief on appeal consists of a photocopy of Rush's brief. McDermot stated in a cover letter accompanying the photocopy of Rush's brief that he would file his own brief at a later date, but he never

and sentences, raising seven grounds for reversal. The Government cross-appeals, contending that the district court erroneously applied the sentencing guidelines in determining Rush and McDermot's sentences. The Government also appeals from Kochensparger's sentence on the grounds that the district court erroneously calculated the amount of loss attributable to Kochensparger's fraud.

II

A

Rush argues first that his case was so complex that a trial by jury deprived him of his right to due process. Rule 23(a) of the Federal Rules of Criminal Procedure provides that "[c]ases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government." Thus, Rule 23(a) requires the consent of both the government and the court before a defendant may effectively waive a jury trial. *See Serfass v. United States,* 420 U.S. 377, 389, 95 S. Ct. 1055, 1063, 43 L. Ed. 2d 265 (1975) (citing Fed. R. Crim. P. 23(a)). In *Singer v. United States,* 380 U. S. 24, 85 S. Ct. 783, 13 L. Ed. 2d 630 (1965), the Supreme Court upheld the constitutionality of this procedure, reasoning as follows:

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footnote 4 continued
filed such a brief. We hold that McDermot's submission does not comply with rule 28 of the Federal Rules of Appellate Procedure, which provides that "[t]he argument must contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on." Fed. R. App. P. 28(a)(6) (emphasis added). Consequently, we dismiss McDermot's appeal for want of prosecution. *See* 5th Cir. Local Rules 42.3.2, 42.3.3.

> In light of the Constitution's emphasis on jury trial, we find it difficult to understand how the petitioner can submit the bald proposition that to compel a defendant in a criminal case to undergo a jury trial against his will is contrary to his right to a fair trial or to due process. A defendant's only constitutional right concerning the method of trial is to an impartial trial by jury. We find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him . The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result.

Id. atg 36, 85 S. Ct. at 790. The Court thus concluded: "Having found that the Constitution neither confers nor recognizes a right of criminal defendants to have their cases tried before a judge alone, we also conclude that Rule 23(a) sets forth a reasonabale procedure governing attempted waivers of jury trials." *Id* at 26, 85 S. Ct. at 785-86.[5]

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[5] The Supreme Court has since restated this principle in *United States v. Jackson*, 390 U.S. 570, 584, 88 S. Ct. 1209, 1217-18, 20 L. Ed. 2d 138

Rush argues that *Singer* "left open the possibility that in the proper circumstances a jury could be waived over government objection." In fact, the Supreme Court stated:

> We need not determine in this case whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial. Petitioner argues that there might arise situations where "passion, prejudice . . . public feeling" or some other factor may render impossible or unlikely an impartial trial by jury. However, since petitioner gave no reason for wanting to forgo jury trial other than to save time, this is not such a case and petitioner does not claim that it is.

Id. at 37-38, 85 S. Ct. at 791. This language makes clear that the Court specifically reserved the question of whether a jury trial could amount to a denial of a defendant's right to an *impartial* trial. The Court's emphasis on impartiality conforms with its definition of the criminal defendant's right: "A defendant's only constitutional right concerning the method of trial is to an *impartial* trial by jury." *Id.* at 36, 85 S. Ct. at 790 (emphasis added).

Rush does not challenge the impartiality of his trial.

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footnote 5 continued

(1968) ("It is true that a defendant has no constitutional right to insist that he be tried by a judge rather than a jury . . ."") (citing *Singer*, 380 U.S. at 24, 85 S. Ct. at 783) and *Serfass*, 420 U.S. at 389, 95 S. Ct. at 1063 ("[o]f course, a jury trial could not be waived . . . without the consent of the Government and of the court.") (citing Fed. R. Crim. P. 23(a)).

Rather, he argues only that a jury was incapable of understanding the issues in his case. As Rush and McDermot have not alleged a violation of their due process right to an impartial trial, we reject their argument that due process required a bench trial in this case.

B

Rush also challenges his indictment on two grounds: First, because it contained unnecessary argument in an introduction to Counts 1 through 11; and second, because what he refers to as "Count 1" was duplicitous. We review the sufficiency of an indictment de novo. *See United States v. Wiley*, 979 F. 2d 365, 367-68 (5th Cir. 1992) (reviewing sufficiency of the indictment, including whether it was duplicitous, de novo).

1

Rush argues that the district court should have granted his motion to dismiss Counts 1 through 11 or "sever" Count 1 because Count 1 was duplicitous and Counts 2 through 11 incorporated Count 1 by reference.[6] "An indictment may be duplicitous if it joins in a single count two or more distinct offenses." *United States v. Baytank (Houston), Inc.*, 934 F.2d

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[6] We assume that Rush has sufficiently preserved his objection to the alleged duplicity, although we note that Rush's proper remedy was neither a motion to dismiss nor a motion to "sever." "An indictment or information charging two separate offenses in a single count is duplicitous, but this is not fatal, and does not require dismissal of the count. The proper

599, 608 (5th Cir. 1991), *accord United States v. Cooper*, 966 F.2d 936, 939 n.3 (5th Cir.), *cert. denied*, ____ U.S. ____, 113 S. Ct. 481, 121 L. Ed. 2d 386 (1992). *See generally* 1 Charles A. Wright, *Federal Paractice and Procedure* § 142 (2d ed. 1982). "If an indictment is duplicitous and prejudice results, the conviction may be subject to reversal." *Baytank*, 934 F.2d at 608.[7]

Rush's argument seriously mischaracterizes the superseding indictment. What Rush calls "Count 1," is not a separate count. It is a narrative introduction to Counts 1 through 11 entitled "Part B. The Scheme," and it contains allegations concerning the alleged scheme to defraud and Rush's role in it.

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footnote 6 continued

remedy is to require the government to elect upon which charge contained in the count it will rely . . . ." 1 Charles A. Wright, *Federal Practice and Procedure* § 145, at 523 (2d ed.1982) (footnotes omitted). *See also United States v. Salinas*, 654 F.2d 319, 325-26 (5th Cir. Unit A 1981) (noting that defendant's "motion to compel election, filed before trial, was the proper means of objecting to being charged in the same count with two or more separate offenses"), *overruled on other grounds, United States v. Adamson*, 700 F.2d 953 (5th Cir. Unit B) (en banc), *cert. denied*, 464 U.S. 833, 104 S. Ct. 116, 78 L. Ed. 2d 116 (1983).

[7] "The vice of duplicity is that there is no way in which the jury can convict of one offense and acquit on another offense contained in the same count." 1 Wright, *Federal Practice and Procedure* § 142, at 475. *See also Cooper*, 966 F.2d at 939 n.3 ("The ban against duplicitous indictments derives from four concerns: prejudicial evidentiary rulings at trial; the lack of adequate notice of the nature of the charges against the defendant; prejudice in obtaining appellate review and prevention of double jeopardy; and risk of a jury's nonunamimous verdict.") (citing Wright, *Federal Practice and Procedure* § 142).

Taken in its best light, Rush's argument amounts to this: the introductory allegations in Part B concerning the alleged scheme to defraud, which are necessaray to allege the offense of mail fraud, *see infra* part II.D. allege more than one scheme; therefore, Counts 1 through 11 are duplicitous because each count alleges a mailing in furtherance of what was really more than one scheme.

Rush cites no analogous cases to support his duplicity claim. In addition, the basis for his argument is limited to the lack of proof at trial connecting what he contends were two distinct schemes. The proof at trial, however, is irrelevant to the question of whether an *indictment* is duplicitous.[8] As the Ninth Circuit explained in *United States v. Mastelotto*, 717 F.2d 1238 (9th Cir. 1983):

> In reviewing an indictment for duplicity, our task is not to review the evidence presented at trial to determine whether it would support charging several crimes rather than just one, but rather solely to assess whether the indictment itself can be read to charge only one violation in each count.

Id. at 1244. Thus, if Part B can be read to allege a single

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[8] The insufficiency of the government's proof of one scheme might have given rise to a claim of variance. *See, e.g. United States v. Faulkner*, 17 F.3d 745, 759 (5th Cir.) (addressing claim that variance existed between allegation of one conspiracy in indictment and proof at trial), *cert. denied*, ___ U.S. ___, 115 S. Ct. 663, 130 L. Ed. 2d 598 (1994); *Owens v. United States*, 221 F.2d 351, 354-55 (5th Cir. 1955) (addressing claim that proof at trial showed separate schemes to defraud in variance with single scheme alleged in indictment). However, Rush raised no such claim in the district court and does not argue variance on appeal.

scheme, Counts 1 through 11 are not duplicitous.

We hold that Part B clearly alleges a single, ongoing scheme. The fact that ait further alleged more than one means by which Rush sought to accomplish the scheme does not render it duplicitous. *See Owens v. United States,* 221 F.2d 351, 354 (5th Cir. 1955) (holding that "the defrauding of different people over an extended period of time, using different means and representations, may constitute but one scheme"); *Weiss v. United States,* 122 F.2d 675, 680 (5th Cir.) ("A single scheme to defraud may involve, a multiplicity of ways and means of action and procedure."), *cert. denied,* 314 U.S. 687, 62 S. Ct. 300, 86 L. Ed. 550 (1941).

Rush also argues that the district court should have granted his motion to dismiss the indictment on the grounds that the indictment was needlessly verbose and argumentative. Rush relies on the requirement in Rule 7(c) of the Federal Rules of Criminal Procedure that the indictment contain a "plain, *concise,* definitive written statement" of the charges against the defendant. Fed. R. Crim. P. 7(c) (emphasis added). Rush cites no authority in support of his position, and he ignores the ample authority clarifying that a defendant's remedy in the face of a needlessly wordy indictment is a motion to strike surplusage under Rule 7(d). *See* 1 Wright, *Federal Practice and Procedure* § 127, at 424-27. As Professor Wright explains:

> The presence of surplusage is not fatal to the validity of the indictment, and indeed, as has been seen, the court need not submit to the jury surplus elements of an indictment not essential to the allegation of an offense. Rule 7(d) provides an ad-

> ditional remedy, and permits the court on motion of a defendant to strike the surplusage. The purpose of this provision is to protect the defendant against prejudicial allegations of irrelevant or immaterial facts. Prosecutors have been known to insert unnecessary allegations for "color" or "background" hoping that these will stimulate the interest of juries. The proper course is to move to strike the surplusage rather than to move to dismiss the indictment.

Id. at 424-26 (footnotes omitted). As Rush did not move to strike the surplusage of which he now complains,[9] and because no basis existed for the district court to dismiss the indictment altogether, we affirm the court's denial of Rush's motion to dismiss the indictment as needlessly wordy.

C

Rush also contends that Judge Mitchell should have ordered a new trial following the death of Judge Arceneaux. According to Rule 25(b) of the Federal Rules of Criminal Procedure:

> If by reason of . . . death . . . the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform

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[9] Rush's counsel explained at oral argument that he did not move to strike the unnecessary language because he could not identify any specific language that could be deleted while still leaving a viable indictment.

> those duties; but if that judge is satisfied that a judge who did not preside at trial cannot perform those duties or that it is appropriate for any other reason, that judge may grant a new trial.

"We review a decision under Rule 25(b) for abuse of discretion." *United States v. Bourgeois*, 950 F.2d 980, 988 (5th Cir. 1992). Rush concedes that the "prevailing view seems to be" that the successor judge can perform the court's duties by reviewing the record and taking any necessary additional evidence. However, he contends that this case was too complex for Judge Mitchell to be able to perform the court's duties in this manner. Specifically, Rush contends that because a motion for acquittal "requires the new judge to weigh all of the competing evidence which he did not hear," "such an undertaking was impossible in the present case due to the overall complexity." This argument is frivolous.

Ruling on a motion for acquittal does not involve "weighing all the competing evidence." Rule 29 of the Federal Rules of Criminal Procedure provides that the district court "shall order the entry of judgment of acquittal . . . if the evidence is insufficient to sustain a conviction of such offense . . . ." In determining whether the evidence is sufficient, the court must construe the evidence and all reasonble inferences that may be drawn from it in the light most favorable to the jury verdict, and "[i]t is the 'sole province of the jury to weigh the evidence and the credibility of the witnesses.' " *United States v. Lechuga*, 888 F.2d 1472, 1476 (5th Cir. 1989) (quoting *United States v. Martin*, 790 F.2d 1215, 1219 (5th Cir.), *cert. denied* 479 U.S. 868, 107 S. Ct. 231, 93 L. Ed. 2d 157 (1986); *accord United States v. Martinez*, 975 F.2d 159, 160 (5th Cir. 1992) ("Determining the weight and credibility of the

evidence is within the sole province of the jury."), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1346, 122 L. Ed. 2d 728 (1993).

Judge Mitchell denied Rush's motion for a new trial following the death of Judge Arceneaux after carefully reviewing the record, and we conclude that his decision to fulfill his functions as a successor judge without a new trial did not amount to an abuse of his discretion under Rule 25(b). *See Bourgeois*, 950 F.2d at 988 (holding that district court's decision not to order a new trial under Rule 25(b) was not abuse of discretion because court familiarized itself with case by thoroughly reviewing record).[10]

E

Rush also argues that there was insufficient evidence to convict him of mail fraud in connection with his withholding of LIGA refunds from A & R borrowers. "In reviewing a sufficiency challenge we may not reweigh the evidence or impose our preferred interpretation." *United States v. Cavin*, 39 F.3d 1299, 1305 (5th Cir. 1994). "Rather, we must view the evidence and all inferences therefrom in the light most favorable to the verdict and must affirm it a rational jury could have found that the government proved each element of the offense beyond a reasonable doubt." *Id.*

"To establish the essential elements of section 1341 mail fraud, the government must show that the defendant

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[10] Rush also argues that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1988), deprived the district court of subject matter jurisdiction over his indictment. We recently rejected the same argument in *United States v. Cavin*, , 39 F.3d 1299 (5th Cir. 1994), and for the reasons stated in that case, we reject Rush's argument here.

(1) used a scheme to defraud, (2) which involved a use of the mails, (3) and that the mails were used for the purpose of executing the scheme." *United States v. Nguyen*, 28 F.3d 477, 481 (5th Cir. 1994); *see also United States v. Ragan*, 24 F.3d 657, 659 (5th Cir. 1994) ("To establish that [the defendant] committed mail fraud in violation of 18 U.S.C. § 1341, the government was required to prove that [he] used the mails for the purpose of executing a scheme to defraud.").

The evidence at trial, viewed in the light most favorable to the verdict, depicted the following: A & R financed premiums for individuals seeking to purchase automobile insurance from Lloyds of Louisiana. A & R's financing arrangement allowed a prospective policyholder to pay 35% of the price of the insurance as a down payment, while A & R financed the balance. The borrower/policyholder would then pay the balance to A & R in three, five, seven or nine installments. The financing agreement gave A & R power of attorney with respect to the policy.[11]

When Lloyds of Louisiana failed in 1986, A & R,[12] exercising its power of attorney with respect to its customers' policies, attempted to obtain refunds of the customers' unused premiums from LIGA. At first, LIGA refused to pay refunds directly to A & R without the signatures of the insureds on

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[11] This power of attorney included the power to cancel the policy if the borrower/policyholder failed to pay the installments. A & R timed the installments in such a way that if a borrower defaulted, A & R could cancel the policy, obtain a refund from Lloyds, apply this refund to the balance due from the borrower, and thereby break even.

[12] A & R Capital changed its name to Emerald Financial and Mortgage, Inc. in 1986. For ease of reference, we refer to the company as A & R throughout.

the necessary proofs of claim. LIGA apparently changed its position some time later and mailed refunds to A & R Capital on proofs of claim submitted without the insured's signature.

Eight of these LIGA refunds formed the basis for counts 12 through 19, and each of the mailings followed a similar pattern. First, A & R would prepare a proof of claim indicationg that it had financed the insured's premiums. Sometimes they would submit it to the borrower/insured for his or her signature, and sometimes Martha Hunt, the President of A & R, would sign the proof of claim herself. Then, either the borrower/insured or A & R itself submitted the proof of claim to LIGA. Days later, LIGA sent A & R Capital a refund check for the amount of the claim, which A & R Capital promptly deposited. After checking the borrower's account, Martha Hunt then prepared a refund check with the borrower's name and address on it for the amount due the borrower.[13]

The intended recipients of these checks never received them, however because Hunt withheld the checks at Rush's instruction.[14] Hunt testified at trial that Rush told her not to send a refund check unless a customer called to ask for it and then only if Rush personally authorized the refund.

Rush concedes that the evidence was sufficient to prove beyond a reasonable doubt that he employed a scheme

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[13] If the borrower had an outstanding balance, the LIGA refund was first applied to that balance, and if there were funds left over, Hunt prepared a check for that amount.

[14] The government entered into evidence a large box of refund checks made out to A & R borrowers that were never sent. Although Hunt testified that she withheld all of the checks at Rush's instruction, Rush was not charged with mail fraud in connection with these checks.

to defraud the customers of A & R. However, he contends that the evidence was insufficient to prove that the mails were used for the purpose of executing that scheme. "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." *Kann v. United States,* 323 U.S. 88, 95, 65 S. Ct. 148, 151, 89 L. Ed. 88 (1944). "To be part of the execution of the fraud, however, the use of the mails need not be an essential element of the scheme. It is sufficient for the mailing to be 'incident to an essential part of the scheme,' or ' a step in [the] plot,' " *Schmuck v. United States,* 489 U.S. 705, 710-11, 109 S. Ct. 1443, 1447-48, 103 L. Ed. 2d 734 (1989) (citations omitted) (quoting *Pereira v. United States,* 347 U.S. 1, 8, 74 S. Ct. 358, 362, 98 L. Ed. 435 (1954) and *Badders v. United States,* 240 U.S. 391, 394, 36 S. Ct. 367, 368, 60 L. Ed. 706 (1916)). Furthermore, "—the Government need not prove that the accused used the mails himself or actually intended that the mails be used. The requisite statutory purpose exists if the alleged scheme's completion could be found to have been dependent in some way upon the information and documents which passed through the mails." United States v. Pazos, 24 F.3d 660, 665 (5th Cir. 1994).

Rush concedes that the LIGA miailings were the "sine qua non" of the alleged scheme—that without them the scheme would not have succeeded. He argues, however, that "there was no testimony that [the LIGA] mailings were in any way part of the scheme to defraud." According to Rush, the act that the Government proved was fraudulent (his instructions to Hunt not to send out a refund check unless the borrower so requested) occurred only after Rush received the

checks. In other words, because the scheme to defraud did not exist until after the mailing, the mailing was not "for the purpose of executing the fraud."

Rush's argument is legally flawed. In *Schmuck,* the Supreme Court upheld a defendant's mail fraud conviction because the mailing was incident to an essential part of his fraudulent scheme. In that case, the defendant's fraud consisted of rolling back the odometers of used cars and then selling the cars at artificially inflated prices to retail dealers. *Id.* at 707, 109 S. Ct. at 1446. The mailing occurred when the retail dealers sold the cars and submitted a title application through the mail on behalf of the retail customer. *Id.* The Supreme Court reasoned that "although the registration-form mailings may not have contributed directly to the duping of either the retail dealers or the customers, they were necessary to the passage of title, which in turn was essential to the perpetuation of Schmuck's scheme." *Id.* at 712, 109 S. Ct at 1448. Thus, under *Schmuck,* a mailing satisfies the "for the purpose of executing the fraud" requirement of § 1341 if it is essential to the success of the scheme to defraud, something Rush basically concedes when he admits that the LIGA mailings were the *sine qua non* of his fraudulent scheme.

Of course, this case differs from *Schmuck* in one sense because the timing of the mailings is reversed. In *Schmuck,* the mailing came after the fraudulent act but was held to be part of the fraudulent scheme. In this case, Rush received the LIGA mailings before the fraudulent act of withholding the checks from their intended recipients, and we must determine whether the mailings were nevertheless part of his fraudulent scheme. However, the cases share what

the Supreme Court identified as the key factor in its analysis in *Schmuck*—the existence of an ongoing scheme to defraud:

> Thus, Schmuck's was not a 'one-shot' operation in which he sold a single car to an isolated dealer. His was an ongoing fraudulent venture. A rational jury could have concluded that the success of Schmuck's venture depended upon his continued harmonious relations with, and good relations among, retail dealers, which in turn required the smooth flow of cars from the dealers to their Wisconsin customers.
>
> Under these circumstances, we believe that a rational jury could have found that the title-registration mailings were part of the execution of the fraudulent scheme, a scheme which did not reach fruition until the retail dealers resold the cars and effected transfers of title. Schmuck's scheme would have come to an abrupt halt if the dealers had lost faith in Schmuck or had not been able to resell the cars obtained from him.

Id. at 711-12, 109 S. Ct. at 1448. Similarly here, the evidence depicted an ongoing scheme to defraud A & R borrowers by withholding their refunds as they came in from LIGA.

Furthermore, Rush's argument that the LIGA mailings and the fraudulent scheme were entirely separate depends in part on his incomplete depiction of the evidence in this case. According to Rush, A & R requested the refunds from LIGA in 1986, and LIGA refused. Then, "[t]here was a change of position two years later in 1988 and LIGA at that time unilaterally sent the refunds to A & R Capital/Emerald." Based on this view of the evidence, Rush suggests that because the LIGA mailings simply arrived unilaterally, they could

not have been part of a preconceived fraudulent scheme. However, the evidence, viewed in the light most favorable to the jury's verdict, depicts an entirely different scenario.

Specifically, Government Exhibits 12 through 19 demonstrate that A & R received each LIGA refund check that formed the basis of counts 12 through 19 in direct response to a proof of claim that it prepared and submitted to LIGA or prepared for a borrower to submit to LIGA. In all eight instances, LIGA mailed A & R the check days after the proof of claim was submitted. Thus, there was nothing unilateral about the LIGA refunds that formed the basis for counts 12 through 19. Furthermore, Hunt testified that Rush instructed her to withhold the refunds several times, in 1988 and later, and the LIGA refunds at issue in this case are dated between August of 1988 and December of 1990.

Viewing the evidence in the light most favorable to the jury's verdict, we conclude that a rational jury could find that each of the checks was part of an ongoing scheme to withhold funds to which borrowers were entitled from LIGA. Following the Court's reasoning in *Schmuck*, we further hold that a rational jury could have found that the LIGA mailings were part of the execution of Rush's scheme because Rush's continuing scheme to fraudulently withhold the LIGA refunds depended on his receipt of the checks through the mails. *See id.* at 711-12, 109 S. Ct. at 1448; *see also United States v. McClelland*, 868 F.2d 704, 707-08 (5th Cir. 1989); *Pazos*, 24 F.3d at 665; *United States v. Duncan*, 919 F.2d 981, 990-92 (5th Cir. 1990).[15]

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[15] Rush has cited to no factually similar cases supporting his sufficiency argument, and we have found only one arguable analogous case support-

F

Rush also argues that the district court's determination of his sentence depended on an erroneous calculation of the amount of loss caused by his actions. "Because the calculation of amount of loss is a factual finding, we review that determination for clear error. As long as a factual finding is plausible in light of the record as a whole, it is not clearly erroneous." *United States v. Wimbish*, 980 F.2d 312, 313 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2365, 124 L. Ed. 2d 272, *abrogated on other grounds by Stinson v. United States*, ___ U.S. ___, 113 S. Ct. 1913, 123 L. Ed. 2d 598 (1993). Section 2F1.1(b)(1) of the Sentencing Guidelines provides for incremental offense level increases depending on the amount of loss. United States Sentencing Commission, *Guidelines Manual*, § 2F1.1(b)(1) (Nov. 1991). The commentary to § 2F1.1 states that "the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information." U.S.S.G. §2F1.1, comment. (n.8).

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footnote 15 continued

ing reversal. In *United States v. Vontsteen*, 872 F.2d 626 (5th Cir. 1989), we reversed a mail fraud conviction because the evidence was insufficient to prove that the mailings were "for the purpose of" executing the scheme. In *Vontsteen*, the defendants were charged with fraudulently buying pipe on credit during a down period in the market, short-selling it, and then refusing to pay the suppliers. *Id.* at 628. The alleged mailings were invoices the defendants received through the mail from suppliers of the pipe, *id.*, and we held that the invoices did not further the scheme to defraud and consequently could not support convictions under § 1341, *id.* at 629. We distinguished *Schmuck* on the grounds that while the scheme involved multiple fraudulent acts and mailings, perpetration of the scheme did not *depend* on the mailings. *Id.* In this case, however, the success of Rush's scheme absolutely depended on his receipt of the LIGA checks.

The district court increased Rush's offense level by fourteen levels under § 2F1.1(b)(1)(0) after finding that Rush's fraud resulted in a loss of between $5 and $10 million. The Presentence Investigtion Report ("PSR") suggested a fifteen-level increase for a loss of between $10 and $20 million. This recommendation was based on the finding that the losses caused by the failure of Presidential, as calculated by LIGA and Presidential's liquidator at the time of the PSR's preparation, were $11, 105,018.00. The PSR noted that additional losses were expected as the liquidation process continued. Rush objected to these findings on the grounds that Presidential's failure was caused not by Rush's fraudulent scheme, but rather by the failure of Presidential's reinsurer in 1986. In fact, Rush contended, his alleged fraud allowed him to continue operating Presidential and thereby reduce the losses that would otherwise have resulted had he allowed Presidential to fail in 1989.

The district court, after considering numerous exhibits and the testimony of twelve witnesses at a lengthly sentencing hearing, found that the losses caused by the failure of Presidential's reinsurer amounted to approximately $8 million. He therefore subtracted this amount from the $12 million total loss caused by Presidential's failure. However, he added $4 million to that amount to reflect losses incurred by insureds outside of Louisiana whose policies are not guaranteed by LIGA. Finally, the court added $60,000 for the refund checks that Rush withheld from A & R borrowers. After noting that "some more losses could probably be calculated" based on additional items in the record, the court found that the total amount of loss fell between $5 and $10 million.

After reviewing the sentencing record, we conclude that the district court's findings in connection with its calculation of loss under § 2F1.1 are "plausible in light of the record as a whole," *Wimbish*, 980 F.2d at 313, and its estimate of between $5 and $10 million was "a reasonable estimate of the loss, given the available information." U.S.S.G. § 2F1.1, comment. (n.8); *cf. United States v. Robichaux*, 995 F.2d 565, 571 (5th Cir.), *cert. denied*, ____ U.S. ____, 114 S. Ct. 322, 126 L. Ed. 2d 268 (1993).[16]

III

A

The Government cross-appeals from the district court's sentencing determinations for Rush and McDermot, arguing that the district court erred in failing to increase their offense levels under U.S.S.G. § 2F1.1(b)(6). "We will uphold a sentence imposed under the guidelines unless it is imposed in violation of law, is the result of an incorrect application of the guidelines, or is an unreasonable departure from the applicable guideline range." *United States v. Guadardo*, 40 F.3d 102, 103 (5th Cir. 1994). Section 2F1.1(b)(6)(A) pro-

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[16] In *Robichaux*, we upheld the district court's enhancement of Robichaux's sentence under § 2F1.1 based on its estimate of the loss resulting from the failure of Presidential as between $5 and $10 million. *Id.* at 571. (Robichaux was separately indicted for his role in Rush's scheme to defraud the Louisiana Department of Insurance.) We held that the district court's estimante, which is the same figure reached by the district court in this case, was reasonable and not clearly erroneous. *Id.* We note that although *Robichaux* supports our holding in this case, it does not, *ipso facto*, dictate our conclusion because the records in the two cases are different, and under the clearly erroneous standard, we review the entire record, *see Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985).

vides: "If the offense substantially jeopardized the safety and soundness of a financial institution . . . increases by 4 levels. If the resulting offense level is less than level 24, increase to level 24." The commentary to § 2F1.1(b)(6) provides:

> An offense shall be deemed to have "substantially jeopardized the safety and soundness of a financial institution" if, as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.

U.S.S.G. § 2F1.1(b)(6) comment. (n.15). The district court rejected an enhancement under § 2F1.1(b)(6) because it found that Presidential "had already become insolvent by the failure of the reinsurer" and therefore the language in application note 15, "if, as a consequence of the offense, the institution becomes insolvent," did not apply. The Government does not argue that this finding was clearly erroneous, but rather that the district court applied the wrong legal standard when it ignored the other factors listed in application note 15.[17]

We agree. Application note 15 lists four types of dangers to the safety of a financial institutiion, only one of which is

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[17] In particular, te government contends that "[t]he fraudulent manipulations with the non-existent unencumbered securities allowed Presidential to continue to accept premium payments from parties who were unaware that Presidential was unable to refund on demand any such payments or to fulfill its obligation to pay claims under the policies issued."

insolvency. *Cf. United States v. Bullard*, 13 F.3d 154, 158 n.10 (5th Cir. 1994) (noting that application note 10 to § 2B1.1(b)(7)(A), which is worded identically to note 15 to § 2F1.1(b)(6), "does not limit the meaning of the terms substantially jeopardized the safety and soundness of a financial institution' to the situation where the institution becomes insolvent as a consequence of the defendant's conduct").As we are unable to discern from the sentencing hearing transcript whether the district court considered and rejected the other three factors, we remand to the district court for specific findings on the remaining bases for enhancement under §2F1.1(b)(6). *Cf. United States v. Humphrey*, 7 F.3d 1186, 1190-91 (5th Cir. 1993) (remanding to district court where it was unclear whether sentencing determination reflectd implicit finding or disregard of guideline factor).

B

The Government also appeals from Kochensparger's sentence. Kochensparger pled guilty to one count of conspiracy to commit mail and wire fraud. The charges against Kochensparger stemmed from his false representations that his securities firm held assignments of GNMA's purportedly owned by Presidential.

The Government contests the following findings by the district court:

> I don't think Mr. Kochensparger is anywhere near as culpable as the other two [McDermot and Rush]. There's no way I think you should be held accountable for the amount of loss. I realize the Probation Officer wrote it up the way he felt like he had to

> and I understand that he did that and why he did that and I'm not faulting him for it, but I just don't think that this kind of loss was reasonably foreseeable to Mr. Kochensparger and I think the guidelines and the case law dealing with conspiracy will support this finding. Mr. Kochensparger is undoubtedly guilty of fraud, nothing more, nothing less.
>
> Based on his Criminal History Category 1, his level offense should be "6" and the guideline range should be 0 to 6 months.
>
> I've decided against giving him a two-level reduction for minor participation only because I'm giving him such a big break on the loss, anyway, and the Sentencing Guidelines are the same whether it is Level 4 or 6. In the alternative, even if he can technically be found to be held accountable for the loss, the Court feels that there are mitigating circumstances with this Defendant not taken into consideration . . . by the Sentencing Commission for the guidelines; namely, overall in involvenment and lack of profit.

Record on Appeal, vol. 10, at 9-10. The Government contends that the district court's finding "arbitrarily disregard[ed] an appropriate calculation of loss," and suggests that the court's conclusions find no basis in the guidelines.

We do not address the merits of the district court's first alternative determination regarading the amount of loss attributable to Kochensparger; instead, we affirm Kochensparger's sentence because the Government does not challenge the district court's second alternative finding that the circumstances of Kochensparger's crime warranted a

downward departure from the guideline range. By statute, the court may depart downward from a guideline range if it finds that "there exists [a] . . . mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described." 18 U.S.C. § 3553(b) (1988); *see* U.S.S.G. 5K2.0, p.s. (noting the district court's authority to depart from the guidelines under § 3553(b)). The district court determined that such circumstances existed in this case, namely Kochensparger's minimal involvement and his lack of profit.[18]

The Government's sole argument is that the district court's calculation of the amount of loss attributed to Kochensparger was clearly erroneous, a finding not relevant to the court's alternative determination that mitigating circumstances warranted a downward deparature. Although the Government does indirectly suggest that the mitigating circumstances on which the district court relied were improper, its argument depends on a mischaracterization of the sentencing record. In its quotation of the district court's reasons for departing from the guideline range, the Government conveniently deletes the "namely, overall in involvement and

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[18] We note that according to the Supreme Court's interpretation of Rule 12 of the Federal Rules of Criminal Procedure, the district court was required to provide notice to the government before *sua sponte* departing downward from the applicable guideline range. *See Burns v. United States*, 501 U.S. 129, 131 & 135 n.4, 111 S. Ct. 2182, 2183 & 2185 n. 4, 115 L. Ed. 2d 123 (1991); accord *United States v. Andruska*, 964 F.2d 640, 643-44 (7th Cir. 1992). The government did not object on those grounds, however, and it does not raise the issue on appeal.

We also do not address whether the district court's "in the alternative" sentencing determinations are permissible under the guidelines because the government has not raised the issue on appeal.

lack of profit" language from the court's statement. The Government then suggests that the mitigating circumstances the district court had in mind were letters written by Kochensparger's children.[19] This argument is beside the point, however, because the district court actually relied on Kochensparger's minimal involvement and lack of profit. Furthermore, because the Government does not challenge the district court's reliance on those grounds, we do not decide whether minimal involvement and lack of profit are permissible grounds for a downward departure.

III

For the foregoing reasons, Rush's conviction is AFFIRMED, Rush's sentence is VACATED and REMANDED for further proceedings consistent with this opinion, Kochensparger's sentence is AFFIRMED, and McDermot's appeal is DISMISSED.

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[19] Had the district court relied on Kochensparager's family ties and responsibilities, its departure might indeed have been improper. *See U.S.S.G.* § 5H1.6, p.s. ("Family ties and responsibilities . . . are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range."); *see also United States v. Fierro*, 38 F.3d 761, 775 (5th Cir. 1994) (holding that family ties and responsibilities are "improper grounds for departure" (citing U.S.S.G. §5H1.6)), *cert. denied*, 63 U.S.L.W. 3690 (U.S. Mar. 20, 1995).

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SECOND SUPERSEDING INDICTMENT FOR CONSPIRACY, MAIL FRAUD, WIRE FRAUD

UNITED STATES OF AMERICA	*	CRIMINAL DOCKET NO.
v.	*	SECTION
GORDON L. RUSH, JR. PETER MCDERMOT, II	*	VIOLATION: 18 U.S.C. 2 18 U.S.C. 371 18 U.S.C. 1341 18 U.S.C. 1343

The Grand Jury charges that:

COUNTS 1 - 11

A. AT ALL TIMES MATERIAL TO THIS INDICTMENT:

1. **GORDON L. RUSH, JR.**, defendant herein, was the officer, director, and principal stockholder of numerous companies, including, but not limited to: Presidential Fire & Casualty Company (Presidential); G.L.R., Inc.'; A & R Capital

Corporation (A&R Capital); and Emerald Financial & Mortgage, Inc. (Emerald).

2. Presidential was incorporated in 1985, as a Louisiana property and casualty insurance company.

3. A & R Capital was a Louisiana corporation created to finance insurance premiums. Its successor company was Emerald.

4. Steven W. Kochensparger, a co-conspirator previously indicted, was the branch office manager for Parsons Securities, Inc., Columbus, Ohio.

5. **PETER MCDERMOT, II,** defendant herein, did business under various names, including Affiliated Business Consolidated Services Corporation (Affiliated); ABC, INC.; and Aleasco.

6. Edward G. Robichaux (Robichaux), a co-conspirator previously indicted herein, did business under various names, including North American Financial Corporation, N.W. Venture, Woolmarket Investments, Inc. (Woolmarket), and Reserve General Escrow Company (Reserve General).

7. The Louisiana Insurance Guaranty Association (LIGA) was a nonprofit unincorporated legal entity funded by the State of Louisiana to avoid financial loss to claimants or policyholders when an insurer became insolvent.

8. The Touche, Ross, C.P.A. firm (known as Deloitte & Touche, as of December 1, 1989, and hereinafter referred to as Touche, Ross) was retained by LIGA to audit the finances

of Presidential fer the third quarter of 1989.

9. Presidential was declared insolvent by the Louisiana Department of Insurance on November 12, 1991.

10. Federal National Mortgage Association (FNMA) certificates are security devices that are fully insured.

11. Government National Mortgage Association (GNMA) certificates are security devices insured by the United States of America.

B. THE SCHEME:

From on or about January 1, 1985, and continuing until November 12, 1991, in the Eastern District and elsewhere, **GORDON L. RUSH, JR.**, knowingly and willfully devised and intended to devises a scheme and artifice to defraud LIGA; Touche, Ross; the citizens of the States of Louisiana, Mississippi and Texas; and the claimants and policyholders of Presidential, and to obtain money and property by means of false and fraudulent pretenses and representations as set forth below. In or about April, 1991, **PETER MCDERMOT, II** knowingly and willfully joined in the scheme and artifice to defraud and assisted and aided and abetted **GORDON L. RUSH, JR.** and others in the ongoing scheme. The object of the scheme was to place fraudulent assets on Presidential's financial statements in order to allow the company to continue to operate and to provide money for the defendants' personal use. Among the ways, means, and manner in which the defendants sought to accomplish the scheme and artifice to defraud were as follows:

The $1.4 Million Certificate of Deposit

(1) It was part of the scheme and artifice to defraud that in April 1985, defendant **GORDON L. RUSH, JR.** obtained a $1.4 million loan from Investors Bank & Trust Company, Gretna, Louisiana (Investors Bank). The loan was in the name of A & R Capital, and was used to obtain a $1.4 million Certificate of Deposit (CD) in the name of Presidential. Although the CD secured the repayment of the debt, these two transactions were structured to make it appear as though Presidential owned the CD free and clear of any debt.

(2) It was further part of the scheme and artifice to defraud that on or about April 11, 1985, an officer of Investor's Bank mailed a letter of verification to the Louisiana Commissioner of Insurance falsely representing that the $1.4 million CD was unencumbered.

(3) It was further part of the scheme and artifice to defraud that from April, 1985 to September, 1990, Presidential falsely listed the $1.4 million CD as an asset, free and clear of any encumbrances on financial statements submitted to the Louisiana Department of Insurance.

The Fraudulent FNMAs and GNMAs

(4) It was further part of the scheme and artifice to defraud that in July and August 1989, **GORDON L. RUSH, JR.** and Robichaux, through a series of sham transactions, fraudulently represented that Presidential obtained approximately $13 million in FNMAs when **GORDON L. RUSH, JR.** and Robichaux knew Presidential had no legitimate ownership interest in the FNMAs. The addition of the

fraudulent FNMAs as assets to Presidential's financial statements was needed to make Presidential appear solvent, and enable it to continue to sell insurance policies.

(5) It was further part of the scheme and artifice to defraud that Presidential's 1989 annual financial statements represented that the bogus FNMAs were exchanged for approximately $13.6 million of GNMAs, purportedly held by Parsons Securities, Inc., when **GORDON L. RUSH, JR.** knew Presidential had no legitimate ownership interest in the GNMAs. The addition of the fraudulent GNMAs as assets to Presidential's financial statements was again needed to make it appear solvent, and thus enable Presidential to continue to sell insurance policies.

(6) It was further part of the scheme and artifice to defraud that **GORDON L. RUSH, JR.** caused the Louisiana Commissioner of Insurance to send false correspondence to the Texas State Board of Insurance in support of Presidential's request to sell insurance. After writing the letter, the Louisiana Commissioner of Insurance received $55,000 from **GORDON L. RUSH, JR. GORDON L. RUSH, JR.** and Robichaux also submitted false correspondence to the Texas State Board of Insurance in support of Presidential's request.

(7) It was further part of the scheme and artifice to defraud that in June 1990, **GORDON L. RUSH, JR.**, as the result of a series of sham transactions involving Robichaux, fraudulently listed approximately $13.6 million in GNMAs as assets of Presidential, well knowing that these certificates were not owned by Presidential. The addition of the fraudulent GNMAs to Presidential's financial statements continued **GORDON L. RUSH, JR.'s** and Robichaux's ef-

forts to make it appear solvent, and enabled Presidential to continue to sell insurance policies.

The Fraudulent FNMAs and Municipal Bonds

(8) It was further part of the scheme and artifice to defraud that in 1991, **PETER MCDERMOT, II,** individually and through Affiliated, fraudulently represented that Presidential obtained approximately $9 million in FNMAs and Municipal Bonds when both **GORDON L. RUSH, JR.** and **PETER MCDERMOT, II** knew MacDermot and the companies involved in the transactions had no legitimate ownership interest in the FNMAs and Municipal Bonds listed. The addition of these fraudulent assets to the financial statements of Presidential made it appear as if the company was solvent and enabled Presidential to continue to sell insurance policies.

The Diversion of Corporate Monies

(9) As part of the scheme and artifice to defraud, **GORDON L. RUSH, JR.** funnelled to **PETER MCDERMOT, II** and Robichaux monies fraudulently diverted from Presidential, A & R Capital, and other companies operated by **GORDON L. RUSH, JR.**

(10) As part of the above scheme and artifice to defraud, **GORDON L. RUSH, JR.** concealed the diversion of corporate monies for his personal use and benefit.

OFFENSES

COUNTS 1 - 3

On or about the dates listed below, in the Eastern District of Louisiana, **GORDON L. RUSH, JR.**, and others, for the purpose of executing the aforesaid scheme and artifice to defraud, knowingly and willfully caused the listed items to be placed in an authorized depository for mail matter to be delivered by the United States Postal Service, according to the directions thereon, as set forth below:

Ct.	Date	Item Mailed:	Addressed to:
1	3/1/89	1988 Financial Statement of Presidential	Insurance Commissioner State of Louisiana 950 North 5th Street Baton Rouge, La.
2	12/18/89	Edward G. Robichaux letter verifying purchases of FNMAs by G.L.R., Inc. for Presidential	Touche, Ross & Co. 4100 St. Charles Ave. New Orleans, La.
3	3/2/90	1989 Financial Statement of Presidential	Mississippi Ins. Department P.O. Box 79 Jackson, Ms.

All in violation of Title 18, United States Code, Sections 1341 and 2.

COUNTS 4 - 6

On or about the dates listed below, in the Eastern District of Louisiana, **GORDON L. RUSH, JR.**, and others, for the purpose of executing the aforesaid scheme and artifice to defraud, knowingly and willfully caused the transmittal in interstate commerce by means of wire communication, certain signals and sounds in the form of a facsimile of a document, as set forth below:

Ct.	Date	Item Wired:	Facsimiled to:
4	9/13/89	Second Quarter 1989 Financial Statement of Presidential, from Presidential, Gretna, La.	Texas State Board of Insurance Attn: Teresa Saldana (512) 322-3426
5	10/2/89	Letter by Edward G. Robichaux verifying purchase of FNMAs by G.L.R., Inc. for Presidential, from Metairie, La.	Texas State Board of Insurance Attn: Teresa Saldana (512-322-3426

Ct.	Date	Item Wired:	Facsimiled to:
6	12/5/89	Letter by Steven W. Kochensparger falsely purporting to verify Presidential's ownership of approximately $15 million in GNMAs, from Columbus, Ohio	Touche, Ross, C.P.A.s New Orleans, LA

All in violation of Title 18, United States Code, Sections 1343 and 2.

COUNTS 7 - 8

On or about the dates listed below, in the Eastern District of Louisiana, **GORDON L. RUSH, JR., and PETER MCDERMOT, II,** for the purpose of executing the aforesaid scheme and artifice to defraud, knowingly and willfully caused the transmittal in interstate commerce, by means of wire communication, certain signals and sounds in the form of a facsimile of a document, as set forth below:

Ct.	Date	Item Wired:	Facsimiled to:
7	8/4/91	Letter by PETER MCDERMOT, II Listing Muni-	Presidential, attention GORDON L. RUSH, JR. Gretna, Louisiana

Ct.	Date	Item Wired:	Facsimiled to:
		cipal Bonds which he falsely claimed to own, from Las Vegas, Nevada	(504) 392-5354.
8	8/7/91	Second Quarter 1991 Financial Statement of Presidential, from Gretna, La.	PETER MCDERMOT, II, Las Vegas, Nevada (702) 362-2818

All in violation of Title 18, United States Code, Sections 1343 and 2.

COUNT 9

Beginning at a time unknown, but prior to February 5, 1985 and continuing until 1989, in the Eastern District of Louisiana and elsewhere, **GORDON L. RUSH, JR.**, and others did unlawfully, willfully, and knowingly combine, conspire, confederate and agree together to use the United States mails and interstate wire communications in furtherance of the aforesaid scheme and artifice to defraud by falsely representing a $1.4 million CD to be an unencumbered asset of Presidential Insurance Company in violation of Title 18, United States Code, Section 1341, mail fraud, and Title 18, United States Code, section 1343, wire fraud.

A. OVERT ACTS

In furtherance of this consipiracy, **GORDON L. RUSH, JR.** and others committed the following Overt Acts in the Eastern District of Louisiana, and elsewhere, among others:

1. On or about April 11, 1985, **GORDON L. RUSH, JR.**, caused an officer of Investors Bank to mail a letter to the Louisiana Commissioner of Insurance, advising that Presidential had on deposit with Investors a $1.4 million CD which was unencumbered, when the officer of Investors Bank and **GORDON L. RUSH, JR.** knew that the bank was relying on the CD as security for the $1.4 million loan made to A & R Capital.

2. On or about June 27, 1986, **GORDON L. RUSH, JR.**, on behalf of Presidential assigned the $1.4 million CD to Investors as security for a $1.4 million loan.

3. **GORDON L. RUSH, JR.** caused the preparation of the Second Quarter 1989 Financial Statement of Presidential falsely representing that the $1.4 million CD was an unencumbered asset and on or about September 13, 1989, in the Eastern District of Louisiana, caused the transmittal in interstate commerce by means of wire communication, certain signals and sounds in the form of a facsimile of that financial statement to the Texas State Board of Insurance, Attn: Teresa Saldana, at (512) 322-3426.

4. **GORDON L. RUSH, JR.** caused the preparation of the 1989 Annual Financial Statement of Presidential falsely representing that the $1.4 million CD was an unencumbered asset and on or about March 2, 1990, in the Eastern District of Louisiana, caused it to be delivered by the United States Postal Service according to the directions thereon to

the State Insurance Department for Mississippi.

All in violation of Title 18 United States Code section 371.

COUNT 10

Beginning at a time unknown, but prior to July, 1989 and continuing until 1990, in the Eastern District of Louisiana and elsewhere, **GORDON L. RUSH, JR.** and others did unlawfully, willfully, and knowingly combine, conspire, confederate and agree together to use the United States mails and interstate wire communications in furtherance of the aforesaid scheme and artifice to defraud by falsely representing approximately $13.6 million in fraudulent GMNA and FNMA certificates to be assets of Presidential Insurance Company in violation of Title 18, United States Code, Section 1341, mail fraud, and Title 18, United States Code, Section 1343, wire fraud.

A. OVERT ACTS

In furtherance of this conspiracy, **GORDON L. RUSH, JR.** and others committed the following Overt Acts in the Eastern District of Louisiana, and elsewhere, among others:

1. On or about July 11, 1989, **GORDON L. RUSH, JR.** mailed a letter to the Louisiana Commissioner of Insurance falsely verifying that Presidential had acquired an unencumbered interest in FNMAs.

2. On or about August 9, 1989, **GORDON L. RUSH, JR.** mailed another letter to the Louisiana Commissioner of Insurance falsely verifying that Presidential had acquired an unencumbered interest in more FNMAs.

3. On or about September 29, 1989, the Louisiana Commissioner of Insurance transmitted the facsimile of a letter to the Texas State Board of Insurance falsely reassuring the Texas State Board of Insurance of the distinction between G.L.R., INC., and Presidential.

4. On or about October 2, 1989, Edward G. Robichaux transmitted the facsimile of a letter to the Texas State Board of Insurance falsely verifying that North American Financial Corporation held approximately $12,779,424 in FNMAs on behalf of G.L.R., Inc., free and clear of any encumbrances.

5. On or about October 11, 1989, **GORDON L. RUSH, JR.** mailed a letter to the Texas State Board of Insurance falsely representing that G.L.R., Inc . had purchased FNMAs.

6. In the third quarter 1989 financial statements for Presidential, **GORDON L. RUSH, JR.** falsely represented that approximately $13.6 million in FNMAs were owned by Presidential, free and clear of any encumbrances. **GORDON L. RUSH, JR.** caused the financial statements for that period to be sent to various state insurance commissions, including Louisiana, Mississippi, and Texas.

7. On or about December 5, 1989, Steven W. Kochensparger transmitted a facsimile of a letter to Touche, Ross, falsely verifying that Presidential was the owner of approximately $15 million in GNMAs, free and clear of any encumbrances.

8. On or about December 18, 1989, Robichaux mailed a letter to Touche, Ross, falsely verifying that on September 30, 1989, North American Financial Corporation held $12,779,424 in FNMAs on behalf of Presidential.

9. On or about March 2, 1990, **GORDON L. RUSH, JR.** caused Presidential's fraudulent 1989 annual financial statements to be sent to various state insurance commissions, including the Mississippi Insurance Department.

10. In the 1990 quarterly financial statements for Presidential, **GORDON L. RUSH, JR.** falsely represented that approximately $13.6 million in GNMAs were owned by Presidential, free and clear of any encumbrances. **GORDON L. RUSH, JR.** caused the financial statements for those periods to be sent to various state insurance commissions, including Louisiana, Mississippi, and Texas.

All in violation of Title 18 United States Code section 371.

COUNT 11

Beginning at a time unknown, but prior to April 26, 1990 and continuing until August, 1991, in the Eastern District of Louisiana and elsewhere, **GORDON L. RUSH, JR., PETER MCDERMOT, II,** and others did unlawfully, willfully, and knowingly combine, conspire, confederate and agree together to use the United States mails and interstate wire communications in furtherance of the aforesaid scheme and artifice to defraud by falsely representing approximately $9 million in fraudulent FNMA certificates and Municipal Bonds to be assets of Presidential Insurance Company in violation of Title 18, United States Code, Section 1341, mail fraud, and Title 18, United States Code, Section 1343, wire fraud.

A. OVERT ACTS

In furtherance of this conspiracy, **GORDON L. RUSH, JR., PETER MCDERMOT, II,** and others committed the

following Overt Acts in the Eastern District of Louisiana, and elsewhere, among others:

1. On or about April 26, 1991, **GORDON L. RUSH, JR. and PETER MCDERMOT, II** signed a Surplus Contribution Agreement, purporting to sell more than $9 million in fraudulent FNMAs and Municipal Bonds to Presidential. As a result of the Agreement, **PETER MCDERMOT, II** became a Director of Presidential.

2. In the second quarter 1991 financial statements for Presidential, **GORDON L. RUSH, JR.** falsely represented that over $9 million in FNMAs and Municipal Bonds were owned by Presidential, free and clear of any encumbrances. **GORDON L. RUSH, JR.** caused the financial statements for those periods to be sent to various state insurance commissions.

3. In August 1991, **PETER MCDERMOT, II** falsely represented that he owned approximately $7 million of Municipal Bonds and had contributed them to Presidential for use as surplus assets.

4. **GORDON L. RUSH, JR. and PETER MCDERMOT, II** continued to issue insurance policies, when they knew that Presidential was financially impaired.

All in violation of Title 18, United States Code, Section 371.

COUNTS 12 - 19

A. AT ALL TIMES MATERIAL TO THIS INDICTMENT:

1. **GORDON L. RUSH, JR.**, defendant herein, was the

officer, director, and principal stockholder of A & R Capital Corporation (A&R Capital) and Emerald Financial & Mortgage, Inc. (Emerald);

2. A & R Capital was a Louisiana corporation created to finance insurance premiums. Its successor company was Emerald.

3. The Louisiana Insurance Guaranty Association (LIGA) was a nonprofit unincorporated legal entity funded by the State of Louisiana to avoid financil loss to claimants or policyholders when an insurer became insolvent.

4. Lloyds of Louisiana, a Louisiana based insurance company, was declared insolvent on March 6, 1986. A & R Capital had financed the premiums of many of the Lloyds of Louisiana policyholders, and was still financing said accounts at the time Lloyds of Louisiana failed.

5. In 1986, LIGA began to reimburse policyholders of the defunct Lloyds of Louisiana. Refunds due to policyholders who had financed their Lloyds of Louisiana premiums through A & R Capital were mailed by LIGA to A & R Capital and Emerald, which were to apply the refunds to the policyholders' accounts, and forward any remaining monies to the policyholders.

B. THE SCHEME

In or about 1988, **GORDON L. RUSH, JR.** devised a scheme and artifice to defraud policyholders of Lloyds of Louisiana who had financed insurance policies through A & R Capital by making application to LIGA for amounts due both

policyholders and A & R Capital, receiving LIGA checks generated as a result of these applications and wrongfully retaining funds due the policyholders. The unrefunded monies were then diverted and used by GORDON L. RUSH, JR. for other purposes.

C. OFFENSES

On or about the dates listed below, GORDON L. RUSH, JR. for the purpose of executing the aforesaid scheme and artifice to defraud, knowingly and willfully caused mail matter to be delivered in the Eastern District of Louisiana, by the United States Postal Service, according to the directions thereon, as set forth below:

Ct.	Date	Item Mailed:	Addressed to:
12	8/29/88	LIGA refund check for the account of Emmett J. Hummel, Jr.	A & R Capital Box 1605 Gretna, La.
13	8/31/88	LIGA refund check for the account of Kenneth Aquillard	A & R Capital Box 1605 Gretna, La.
14	9/30/88	LIGA refund check for the account of Henry W. Griffin	A & R Capital Box 1605 Gretna, La.

Ct.	Date	Item Mailed:	Addressed to:
15	6/28/90	LIGA refund check for the account of Vanessa Jones	A & R Capital Box 1605 Gretna, La.
16	6/29/90	LIGA refund check for the account of Christine McGee	A & R Capital Box 1605 Gretna, La.
17	10/3/90	LIGA refund check for the account of Ann Young	A & R Capital Box 1605 Gretna, La.
18	10/3/90	LIGA refund check for the account of Richard Payne	A & R Capital Box 1605 Gretna, La.
19	11/14/90	LIGA refund check for the account of Kirk Canova	A & R Capital Box 1605 Gretna, La.

All in violation of Title 18, United States Code, Sections 1341 and 2.

A TRUE BILL:

/s/ Hebert H. Keller

FOREPERSON

/s/ Harry Rosenberg

HARRY ROSENBERG
United States Attorney
Bar Roll No. 11465

/s/ Jan Maselli Mann

JAN MASELLI MANN
Chief, Criminal Division
Assistant United States Attorney
Bar Roll No. 9020

/s/ Mary Jude Darrow

MARY JUDE DARROW
Assistant United States Attorney
Bar Roll No. 16943

New Orleans, Louisiana

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

FILED
JUN 05 1995

No. 93-3603

D.C. Docket No. CR-92-218-LLM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
Cross Appellant,

versus

GORDON L. RUSH, JR.,

Defendant-Appellant,
Cross-Appellee,

Appeal from the United States District Court for the Eastern District of Louisiana

ISSUED AS MANDATE: JUL 28 1995

A true copy
Test
Clerk, U.S. Court of Appeals, Fifth Circuit
By/s/ Illegible
Deputy
New Orleans, La Jul 28 1995

Before WISDOM, JONES, and EMILIO M. GARZA, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed in part, vacated in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

June 5, 1995

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

FILED
JUL 18 1995

No. 93-3603

UNITED STATES OF AMERICA,

Plaintiff-Appellee, Appellant,
Cross Appellant,

versus

PETER McDERMOT, II and
GORDON L. RUSH, JR.,

Defendants-Appellants,
Cross-Appellees,

STEVEN W. KOCHENSPARGER,

Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana

ON PETITION FOR REHEARING

Before WISDOM, JONES, and EMILO M. GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED. However, we amend section III of our opinion to read: "For the foregoing reasons, Rush's conviction is AFFIRMED, Rush and McDermot's sentences are VACATED and REMANDED for further proceedings consistent with this opinion, Kochensparger's sentence is AFFIRMED, and McDermot's appeal is DISMISSED for want of prosecution."

ENTERED FOR THE COURT:

/s/ Emilio M. Garza

United States Circuit Judge

APPENDIX E

APPENDIX OF FORMS

(See Rule 58)

Form 1.

INDICTMENT FOR MURDER IN THE FIRST DEGREE OF FEDERAL OFFICER

In the United States District Court for the ..... District of ....., ... Division

UNITED STATES OF AMERICA

v.

JOHN DOE

No.....
(18 U.S.C. §§ 1111, 1114)

The grand jury charges:

On or about the ..... day of ....., 19...., in the ..... District of....., John Doe with premeditation and by means of shooting murdered John Roe, who was then an officer of the Federal Bureau of Investigation of the Department of Justice engaged in the performance of his official duties.

A True Bill.

....., *Foreman.*

....., *United States Attorney.*

(As amended Dec. 27, 1948, eff. Oct. 20, 1949.)

A-54

Form 2.

INDICTMENT FOR MURDER IN THE FIRST DEGREE ON FEDERAL RESERVATION

In the United States District Court for the .....District of....., ...Division

UNITED STATES OF AMERICA

No.....

v. (18 U.S.C. § 1111)

JOHN DOE

The grand jury charges:

On or about the ..... day of ....., 19..., in the ..... District of ....., and on lands acquired for the use of the United States and under the (exclusive) (concurrent) jurisdiction of the United States, John Doe with premeditation shot and murdered John Roe.

A True Bill.

....., *Foreman.*

....., *United States Attorney.*

(As amended Dec. 27, 1948, eff. Oct. 20, 1949.)

Form 3.

INDICTMENT FOR MAIL FRAUD

In the United States District Court for the ..... District of ....., ... Division

UNITED STATES OF AMERICA

No.....

v. (18 U.S.C. § 1341)

JOHN DOE ET AL

The grand jury charges:

1. Prior to the ..... day of ....., 19 ..., and continuing to the ..... day of ....., 19...,[1] the defendants John Doe, Richard Roe, John Stiles and Richard Miles devised and intended to devise a scheme and artifice to defraud purchasers of stock of XY Company, a California corporation, and to obtain money and property by means of the following false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be false when made: That the XY Company owned a mine at or near San Bernardino, California; that the mine was in actual operation; that gold ore was being obtained at the mine and sold at a profit; that the current earnings of the company would be sufficient to pay dividends on its stock at the rate of six per cent per annum.

2. On the ..... day of ..... 19 ..., in the ..... District of ....., the defendants for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter a let-

Form 3

ter addressed to Mrs. Mary Brown, 110 Main Street, Stockton, California, to be sent or delivered by the Post Office Establishment of the United States.

SECOND COUNT

1. The Grand Jury realleges all of the allegations of the first count of this indictment, except those contained in the last paragraph thereof.

2. On the ..... day of ....., 19 ..., in the ..... District of ....., the defendants, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter a letter addressed to Mr. John J. Jones, 220 First Street, Batavia, New York, to be sent or delivered by the Post Office Establishment of the United States.

A True Bill.

....., *Foreman.*

....., *United States Attorney*

(As amended Dec. 27, 1948, eff. Oct. 20, 1949.)

Form 4.

INDICTMENT FOR SABOTAGE

In the United States District Court for the ..... District of ....., ... Division

UNITED STATES OF AMERICA

No.....

v. (18 U.S.C. § 2154)

JOHN DOE

The grand jury charges:

On or about the ..... day of ....., 19 ..., within the ..... District of ....., while the United States was at war, John Doe, with reason to believe that his act might injure, interfere with or obstruct the United States in preparing for or carrying on the war, wilfully made and caused to be made in a defective manner certain war material consisting of shells, in that he placed and caused to be placed certain material in a cavity of the shells so as to make them appear to be solid metal, whereas in fact the shells were hollow.

A True Bill.

.....,

Foreman.

.....,

United States Attorney.

(As amended Dec. 27, 1948, eff. Oct. 20, 1949.)

Form 5.

INDICTMENT FOR INTERNAL REVENUE VIOLATION

In the United States District Court for the ..... District of ....., ... Division

UNITED STATES OF AMERICA

No.....

v. (26 U.S.C. § 2833[1])

JOHN DOE

The grand jury charges:

On or about the ..... day of ....., 19 ..., in the ..... District of ....., John Doe carried on the business of a distiller without having given bond as required by law.

A True Bill.

....., *Foreman.*

....., *United States Attorney.*

(As amended Dec. 27, 1948, effective Oct. 20, 1949.)

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[1] So in original. Now covered by 26 U.S.C. § 5601(a)(4).

Form 6.

INDICTMENT FOR INTERSTATE TRANSPORTATION OF STOLEN MOTOR VEHICLE

In the United States District Court for the ..... District of ....., ... Division

UNITED STATES OF AMERICA

No.....

v. (18 U.S.C. § 2312)

JOHN DOE

The grand jury charges:

On or about the ..... day of ....., 19 ..., John Doe transported a stolen motor vehicle from ....., State of ..... to ....., State of ....., in ..... District of ....., and he then knew the motor vehicle to have been stolen.

A True Bill.

.....,
Foreman.

.....,
United States Attorney.

(As amended Dec. 27, 1948, effective Oct. 20, 1949.)

Form 11.

INFORMATION FOR FOOD AND DRUG VIOLATION

In the United States District Court for the ..... District of ....., ... Division

UNITED STATES OF AMERICA

No.....

v.

(21 U.S.C. §§ 331, 333, 342)

JOHN DOE ET AL.

The United States Attorney charges:

On or about the ..... day of ....., 19 ..., in the ..... District of ....., John Doe unlawfully caused to be introduced into interstate commerce by delivery for shipment from the city[1] of ....., ... (State), to the city[1] of ....., ... (State), a consignment of cans containing articles of food which were adulterated in that they consisted in whole or in part of decomposed vegetable substance.

....., *United States Attorney.*

(As amended Dec. 27, 1948, effective Oct. 20, 1949.)

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[1] Name of city is stated only to preclude a motion for a bill of particulars and not because such a statement is an essential fact to be alleged.

Form 12.

WARRANT FOR ARREST OF DEFENDANT

In the United States District Court for the ..... District of ....., ... Division

UNITED STATES OF AMERICA

No.....

v.

JOHN DOE

To .....:[1]

You are hereby commanded to arrest John Doe and bring him forthwith before the District Court for the ..... District of ..... in the city of ..... to answer to an indictment charging him with robbery of property of the First National Bank of ....., in violation of 12 U.S.C. § 588b.[2]

....., *Clerk.*

By....., *Deputy Clerk.*

(As amended Dec. 27, 1948, effective Oct. 20, 1949.)

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[1] Insert designation of officer to whom warrant is issued, *e.g.*, "any United States Marshal or any other authorized officer" or "United States Marshal for . . . . District of . . . ."; or any "United States Marshal"; or "any Special Agent of the Federal Bureau of Investigation"; or "any United States Marshal or any Special Agent of the Federal Bureau of Investigation"; or "any agent of the Alcohol Tax Unit."

[2] So in original. Probably should be "18 U.S.C. § 2113".

A-62

Form 13.

SUMMONS

In the United States District Court for the ..... District of ....., ... Division

UNITED STATES OF AMERICA

No.....

v.

JOHN DOE

TO JOHN DOE:

You are hereby summoned to appear before the District Court for the District of ..... at the Post Office Building in the city of ..... on the ..... day of ....., 19 ..., at 10 o'clock A.M. to answer to an information charging you with unlawful transportation of intoxicating liquor on which the internal revenue tax had not been paid.

.....
Clerk.

By.....,
Deputy Clerk.

This summons was received by me at ..... on .....

.....,
Defendant.

(As amended Dec. 27, 1948, effective Oct. 20, 1949.)

Form 14.

WARRANT OF REMOVAL

In the United States District Court for the ..... District of ....., ... Division

To .....:

The grand jury of the United States for the ..... District of ..... having indicted John Doe on a charge of murder in the first degree, and John Doe having been arrested in this District and, after (waiving) hearing, having

APPENDIX F

AMENDMENT VI—JULY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX G

Rule 23. Trial by Jury or by the Court

(a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

APPENDIX H

AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX I

Rule 7. The Indictment and the information

(c) Nature and Contents.

(1) **In General.** The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.

APPENDIX J

pages 1207-1212

EXCERPTS OF TRIAL TESTIMONY

Stumpf - Redirect

Q. What is the date of the assignment, sir?

A. June 27, 1986.

Q. Now, sir, when they talk to you about your opinion on whether something was unencumbered or encumbered, no one talked to you about the assignment of the certificate of deposit to secure a $1.4 million loan, did they, sir?

A. No, because my opinion was written in February of '85 and this is June of 1986.

Q. And they didn't come back to you later when that assignment was prepared, did they, sir?

A. No, sir.

MR. BOITMANN: Your Honor, I have no further questions.

THE COURT: Mr. Garrett.

MR. GARRETT: No questions, your Honor.

THE COURT: Redirect. Just as a matter of courtesy, I can't overlook them. Besides that, he probably needs to be waked up periodically.

MR. GARRETT: I appreciate it, your Honor. Thank you.

REDIRECT EXAMINATION

BY MR. MURRAY:

Q. I'm sorry, Mr. Stumpf. I thought I understood you and now I'm not sure I do. Did you not get a letter from Investors Bank, and we're talking about 201, in which Mr. Haas tells you, We will have to write a letter to the Commissioner of Insurance and advise him that they have the funds on deposit and that they are free of encumbrances?

A. Yes.

Q. All right. Now, were you telling us that Mr. Haas told you you had that — they were going to have to have that requirement and, yet, anytime that they wanted to, they could go in and seize that and take that certificate of deposit and use it for themselves?

A. No. My understanding was that they had to write a letter to the Commissioner of Insurance and say that they had this on deposit and it was unencumbered and right of offset does not create an encumbrance.

Q. An encumbrance is a security interest, I thought you just told Mr. Boitmann.

MR. BOITMANN: Objection, your Honor. Leading form of question.

THE COURT: The objection is overruled. I need to understand this, too. Go ahead and ask him the question. You told Mr. Boitmann what?

Q. Did you not tell Mr. Boitmann that by them signing this collateral pledge that you gave them, and attach a copy of that, that's what would give them the right of offset against that certificate of deposit?

A. Well, that and the fact that Presidential was endorsing the loan or guaranteeing the loan.

Q. Well — they wouldn't have signed it had it not been guaranteeing the loan?

A. Right.

Q. All right. If they had that certificate, and it gave them the right to seize it, in the event the loan went bad, would it not then be encumbered?

A. No. Because an encumbrance is a security interest. The right of offset is not a security interest.

Q. Explain to me, if you would.

THE COURT: That's what makes lawsuits.

A. A security interest would give the bank a right to these funds in previous to any other creditor. That's basically what a security interest does. The right of offset does not give the bank a right of preference to these funds to any other parties, including the owner of the certificate itself. If Presidential wanted to come in when that certificate matured, and take the money out, the bank couldn't stop them. If they had a security interest in it. That's the only way you're going to get this money, is to pay off the loan, and they didn't

have that right. Because the right of compensation or setoff does not grant a security interest. I mean that's the law.

Q. Let me ask the question this way. I mean if the bank were to write a letter to the insurance commissioner stating that we are holding this CD, which has a term on it, whatever the term is, in safekeeping for the insurance commissioner, that under those conditions could the bank still come in and take that money out and use it for its own purposes if he was in default?

A. If the CD was matured and the loan was in default, the bank would have the right of setoff. I mean I don't know how else to say it other than that.

Q. Well, then, what I'm asking, what assurance is being given to the commissioner, then?

A. That at the time that that letter is written, that there is no security interest. It is unencumbered at the time that the letter is written, and they are certifying to the commissioner that they have a certificate of deposit in the name of Presidential Fire, in safekeeping, that is, unencumbered, and at that point in time. I mean I assume when they wrote the letter it was unencumbered because the bank's right of setoff is not an encumbrance.

THE COURT: How about the pledge?

THE WITNESS: There was no pledge, not in 1985. If there was a pledge subsequent to that, I don't know about it.

THE COURT: If the CD had been pledged to the bank

per your form that you attached to your letter —

THE WITNESS: Yes, sir — that —

THE COURT: — Presidential and the borrower signed the pledge form and pledged the CD to the bank, would that be an encumbrance in your opinion?

THE WITNESS: Yes, sir. it would. That is the security interest. A pledge is a form of security interest. But it wasn't to my knowledge, at least my opinion was based upon it not being pledged, not being assigned, the bank not having any security interest in it.

Q. All right. Let me show you what's been introduced as Exhibit 207, which is a letter to the insurance commissioner which states — I'll give it to you to read, but the part I'm interested in, "We are pleased to advise that the subject company, being Presidential Fire & Casualty, has on deposit with our bank a certificate of deposit," and gives the number, "in the amount of 1.4 million, a copy is enclosed for reference, which is unencumbered, which we are holding in safekeeping."

A. Okay.

Q. Now, in your opinion, could that letter have been written regarding the CD if the document which you had sent to Mr. Haas had been executed by Mr. Rush?

A. Yes.

THE COURT: That's the pledge agreement?

THE WITNESS: The pledge agreement. But the CD wasn't pledged. That's the point. The CD was never pledged. The collateral pledge agreement was for other collateral, not for the CD. Because the CD could not be encumbered and was not to my knowledge. I mean to my knowledge it wasn't. Because they had to be able to certify to the commissioner that it was unencumbered. If it had been pledged to the bank, it would have been encumbered, and therefore they could not have written this letter.

Q. And if Mr. Haas had come as the attorney for the bank after having written that letter and showed it to you and asked you about, The insurance commissioner comes and gets this, do we have to give it to him, what would your answer have been?

A. Yes.

MR. MURRAY: No further questions, your Honor.

THE COURT: Mr. Boitmann.

MR. BOITMANN: Just one.

THE COURT: The water is pretty muddy, but you can have another shot if you would like.

MR. BOITMANN: I'll probably pour some more dirt on top of it all.

RECROSS-EXAMINATION

BY MR. BOITMANN:

Q. And, sir, if Mr. Haas came to you and said, By golly, I think the insurance commissioner may be coming next week. Can we demand the loan, and if they don't pay, we can set off the certificate, what would your advice have been?

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pages 449-465

MR. MURRAY: Court indulge me one moment. No further questions, your Honor.

THE COURT: Mr. Garrett.

MR. GARRETT: No cross, your Honor, thank you.

THE COURT: Redirect, government.

MR. BOITMANN: No, your Honor.

THE COURT: May this witness stand down and be excused?

MR. BOITMANN: Yes.

THE COURT: You may stand down and be excused. I think it's coffee time, jury. Let's take about 15 minutes. Stand in recess, Mr. Clerk.

(A recess was taken.)

THE COURT: All right.

MS. DARROW: The government would call Ms. Margaret McGrath to the stand.

MARGARET MCGRATH,

after being sworn by the Deputy Clerk, testified on her oath as follows:

THE WITNESS: My name is Margaret McGrath. M-A-R-G-A-R-E-T M-C-G-R-A-T-H.

DIRECT EXAMINATION

BY MS. DARROW:

Q. How are you employed, ma'am?

A. I'm vice-president, Chemical bank, New York.

Q. And what are your duties at Chemical Bank of New York?

A. I have responsibility for the structured finance department at Chemical Bank, and in part of that department is managing the agency relationship for Ginnie Mae, Government National Mortgage Association.

Q. What do you mean, the agency relationship for Ginnie Mae.?

A. We have a contract with Ginnie Mae to manage all the services related to their securities, which is issuing transfers, and making payment on distribution to the registered holders.

Q. Okay. Let's start with issuing. What do you mean when you say issuing?

A. I have an office in Washington who is responsible for creating Ginnie Mae securities, through registered Ginnie Mae mortgage bankers, pool collateral together and create and apply to Ginnie Mae to create a security. We review that documentation.

Q. When they pool collateral together, what is the collateral that they are pooling together?

A. It's typically single family mortgages.

Q. Mortgages that anybody can get on their own can be pooled together?

A. Mortgages that meet Ginnie Mae's requirements can be pooled together.

Q. Okay. And those are then sold on the market to investors?

A. That's correct.

Q. And when a pool is sold, it's given numbers, correct?

A. That's correct.

Q. A pool gets two different type of numbers, correct, or a Ginnie Mae gets two different type of numbers, correct?

A. A pool number?

Q. Uh-huh.

A. What, the other Cusip number? When the pool is originated, is given a pool number by Ginnie Mae, then the street assigns a Cusip number for the pool for the purpose of trading.

THE COURT: What is Cusip?

THE WITNESS: Cusip is independent organization in New York that creates numbers to track different security instruments for the purposes of trading, buying and selling on the street.

Q. And it tracks them by the number instead of the name of the company or the name of the issuer?

A. That's correct.

Q. Now, you also mentioned P & I payments that you processed through your department. What do you mean when you say P & I payments?

A. As the agent for Ginnie Mae, we're responsible for making principal and interest contribution to the record holder for Ginnie Mae securities. Every month we create the security listing of the registered holder for the people who own the security as of that record date. So as of, for example, people who hold securities in January, record date ending January would receive a principal and interest payment for the scheduled principal and interest dollars that made up that pool in February. So what was passed through by the homeowner to the issuer would then be passed through to the security holder.

Q. And what the homeowner passes through is their monthly payment on their mortgage, right?

A. That's correct. Pay principal, and component of that is interest.

Q. And what type of records does Chemical Bank have relative to Ginnie Maes?

A. As Ginnie Maes age, we hold the central records for all of their securities, Ginnie Mae 1 and Ginnie Mae 2, they are the central paying agent for the Ginnie Mae 2 securities, and individual mortgage bankers, or issuers as they are referred to, are responsible for making payment for Ginnie Mae 1 securities.

Q. Okay.

A. But we hold the records for both.

Q. Very well. When a person or a company or a customer or client purchases Ginnie Maes, how can they get proof of ownership?

A. The best way to make sure that you have a perfected, secured ownership in your pool is to have it registered in your name, because Ginnie Mae securities are registered securities. So if you were to buy a security you could ask the owner of the security to submit it to the transfer agent or through the depository, and they can re-register it into your name or the person who is holding it on behalf of you.

Q. And when it's done that way, how was that ownership recorded?

A. On Chemical Bank's record, if it was passed through Chemical Bank as the transfer agent, physical security was requested, then the physical security would be presented to our office, we would examine that security to make sure that the person who is presenting it is the owner of that security. We would then cancel that security on our record and recreate a security in the person, the requesting party's name. So it would go from Mr. X to Mrs. X through a debit and credit transaction.

Q. And that's what they call book entry, right?

A. That is what they call re-registration. It can be done in book entry into the depository. If it was part of the depository, if you wanted to have it registered through the depository's name, then you would present it to our office and we would create a security in the name of MBSEC & Company, which is the nominee for the Participant's Trust Company, which is the depository for Ginnie Mae securities.

Q. Okay, You said MBSEC is the nominee, not depository?

A. That's correct.

Q. Those are technical terms?

A. Sorry.

Q. MBSEC is what, what is that a name for?

A. It's a name for the holding agent. The group that — it's just a made up name. In other words, it's a name that's meant for which represents the Participant's Trust Company.

Q. And the Participant's Trust Company does what? What kind of company is that?

A. Participant Trust Company is a depository which is made up of broker and different dealers from different parts of the country who buy and sell Ginnie Mae securities. So it's a book entry system for Ginnie Mae securities.

Q. So anything that you got through book entry would go through the records of those participants who belong to Participant's Trust Company?

A. That's correct.

Q. And everything that's book entry is kept on the records for Participant's Trust Company?

A. Participant's Trust Company holds their record of who their participants are who have a position in the Ginnie Mae security.

Q. Okay. But, you have — Chemical Bank as the registered agent also has a list of names other than MBSEC on its record, correct?

A. That's correct. Ginnie Maes are not required to be completely book entry and, so, therefore physical Ginnie Mae securities exist, and any physical security, that there is a registered holder to, we would know who that person is because we would either make payment to them or we would give that information to the issuer, who would then be required to make a payment on a monthly basis.

Q. In other words, those people registered with you that are not MBSEC, which is the code name for the Participant's Trust Company, have a piece of paper that says you are the owner of this Ginnie Mae?

A. They have a Ginnie Mae security.

Q. And is it difficult — but they have a certificate, right?

A. They have a certificate.

Q. Okay. And can anybody get a certificate? If you say I don't want to go book entry, I want to go physical certificate, I can put it in the safety deposit box, can a person or a company do that?

A. Yes. If you have — if you have Ginnie Mae security which is currently book — physical, and you wanted to have it be in physical, you wanted to maintain a physical security, you could present it to Chemical Bank and we could re-register it for you.

Q. And is it very costly to get that done?

A. It's $10 for every credit certificate issued. So if it's a million dollar certificate, and you wanted two certificates issued for $500,000 each, it would be $20.

Q. I'm going to ask you to look on the desk. You see some folders in front of you?

A. Yes.

Q. Okay. There is one that's marked 313. Would you please pull that?

A. Okay.

Q. What's the title of that?

A. Presidential Fire & Casualty, Gordon L. Rush, Jr.

Q. Okay. And is there a date on that?

A. December 1st, 1989.

Q. Have you seen this list before?

A. Yes.

Q. And where have you seen it?

A. I verified this list.

Q. Okay. At my request?

A. Yes.

Q. And what does that list — what does it list? I mean what are the listings in the left column?

A. The listings in the left hand column are the listings of the registered holders of these particular securities or pools, because it's a complete pool dollar amount, for the particular pool as of December 1st, 1989.

Q. Okay. And have you reviewed this document?

A. Yes, I have.

Q. You're familiar with the pool numbers of the Ginnie Maes on this document?

A. Yes, I am.

MS. DARROW: Your Honor, the government would offer, file and introduce into evidence Government Exhibit 313.

THE COURT: Objection?

MR. MURRAY: Only the same one we previously made, your Honor. We made no objecton to it being used as a demonstrative aid to help the jury. We don't think it should be an official.

MR. GARRETT: That's Mr. McDermot's objection.

THE COURT: Same ruling, 313 is admitted.

Q. Ms. McGrath, I'm going to show you a chart and ask if you would compare that to Government Exhibit 313. I believe you've seen the chart as well, correct?

A. Yes, I have. It's the same information.

Q. Okay. Now, each of those pool numbers, were you requested by our office to investigate the ownership or holdings of those pool numbers?

A. Yes, I was.

Q. Okay. If we could go through them one by one. 238517, is the value accurate for December '89?

A. Yes, it is.

Q. Who do your records show is holder?

A. My records show MBSEC was holding.

Q. That was the participants that hold them in book entry?

A. That is correct.

Q. While we're talking about that, when something is held by a Participant's Trust Company, do you as Chemical Bank really care who it is that Participant's Trust is holding it for?

A. No. As agent for Ginnie Mae our records show that Participant's Trust Company was a holder and we would make payment or we would instruct the issuer to make payment to Participant's Trust Company. The Participant's Trust Company would hold subledgers on their accounts which would actually show who the registered holder was.

Q. So that makes it easier for Chemical Bank, you don't have to pay millions of people, but can pay a smaller number of people?

A. We work immediately with MBSEC & Company with the Participant's Trust Company, so —

Q. 254705, are you familiar with that pool number?

A. Yes, I am.

Q. And is the value accurate for December 11, '89?

A. Yes, it is.

Q. Do your records show who specifically was holding?

A. MBSEC & Company was the registered holder.

Q. 262106, is the value accurate?

A. Yes, it is.

Q. Does the record show who is holding during that period?

A. State Street Bank had a physicial security, Donaldson Lufkin had a physical security, Evelyn Schoberth had a physical security.

Q. Is that 262106?

A. I'm sorry.

Q. Okay. I'm going to mark these two. You said these are physical, then?

A. Yes.

Q. And these two holders, did anybody else have a right to them?

A. No. The payment was made to those two holders.

Q. But those two holders held the entire Ginnie Mae?

A. Combined, those two holders held the entire Ginnie Mae.

Q. Now, let's go on to 262103. Is the value accurate?

A. Yes, it is.

Q. And did you show any individual corporations or persons holding those or a portion of the Ginnie Mae physically?

A. The combined, the four, the five people named all had physical securities during that period. And combined they made up the total dollar of the Ginnie Mae security.

Q. So that would be who? Would you read off the names, please?

A. Bank of Birchtree, Travelers, Wall Street Clearing Company, and First National Bank of Chicago.

Q. So, and I believe you had said earlier Ms. Schoberth, Evelyn Schoberth. So if an --

A. Yes.

Q. So if an individaul wanted to buy that Ginnie Mae, they would have to get the physical certificate back or someone would have to get the physical certificate back from one of those companies or Ms. Schoberth, correct?

A. To, yeah, to perfect the transaction you would need to re-register the security from one of those holders to the buyer of the security.

Q. And to register it, what's the proper way to register it?

A. The appropriate way to register it would be to contact the holder of the security, submit it in to Chemical Bank for re-registration, and we would issue a new security to the buyer.

Q. Okay.

A. In their name.

Q. In other words, Evelyn Schoberth, if she wanted to sell it, would have to take that certificate back to you at Chemical Bank and say, here, I'm selling it to John Doe?

A. That's correct.

Q. Okay. And then you could cut John Doe a new physical certificate?

A. Security.

Q. Security. Okay. Let's move on, please, to 262100.

A.: Uh-huh.

Q. And have you verified the value of that?

A. The dollar amount is correct.

Q. Okay. And did you show whether any of that was held physically?

A. The two securities that were held in physical form during that period.

Q. And they are?

A. Libdelco and Travelers Insurance Company.

Q. Okay. 264059. Did you verify its existence and the value?

A. Yes, I did. The dollar amount is correct. Chemical Bank held the physical security and Bank of Virginia held a physical security.

Q. And their holdings equaled the total value of that Ginnie Mae?

A. That's correct.

Q. During this period of time, with everybody that's holding it physically, how did they — who did they get the payments from on the principal and interest?

A. The payments would either have been made by the issuer, the Ginnie Mae issuer if it was a Ginnie Mae 1 pool, or by Chemical Bank if it was Ginnie Mae 2 pool. It's not clear to me at the moment which is which.

Q. 264060. Did you investigate that one?

A. Yes, ma'am, I did. The dollar amount is correct. And

MBSEC & Company was a holder, and First Trust of North America had a physical security.

Q. Okay. So you can verify the First Trust of North America. As far as Manufacturers Hanover, you can't verify that, correct?

A. That's correct.

Q. Your assumption would be, however, that that might be held how?

A. It was registered in MBSEC & Company. It was held in book entry.

Q. 264057?

A. 264057, dollar amount is correct.

Q. Did you have anybody holding it physically according to your records on December 1, 1989?

A. According to my record it was book entry security as of December 1, '89.

Q. 264061?

A. 264061, the dollar amount is also correct, and it was a book entry security.

Q. 264058?

A. 264058, the dollar amount is correct.

Q. And who was holding it, or how was it held?

A. It was physical. It was Libmutco, whatever that is.

Q. Okay. And the second one?

A. And Seidco. They are both physical.

Q. Okay. And 268633?

A. 268633, the dollar amount is correct, and Manufacturers had a physical security.

Q. Okay.

A. And the Liberty Mutual Savings had a physical security.

Q. And did that comprise the entire issuance?

A. Yes, it did.

Q. Ms. McGrath, would you count up those pool numbers that you see up there that I've marked as being held physically, tell us how many of them were completly held in physical form?

A. Five pools were in completely physical forms at the time as of December 1st, 1989.

Q. Maybe six. Would you recount, please?

A. Six.

Q. Okay. Ms. McGrath, if I wanted to go buy an interest in a Fannie Mae, and —

MR. MURRAY: Fannie Mae or Ginnie Mae?

MS. DARROW: Thank you, Mr. Murray. Ginnie Mae.

It's getting confusing, your Honor.

Q. If I wanted to buy an interest in a Ginnie Mae, and someone offered me a contract that says, I hereby assign this to you, would you at Chemical Bank accept that as being good enough to transfer from one name to another?

A. We would like to have a more complete transaction. We would like to have a better perfected instrument by having the security re-registered in our names, or having it better signed over to us.

Q. And if someone showed up and said, Look, I've got this contract. I bought this Ginnie Mae from someone, so Mr. McGrath put it in my name, what would Chemical Bank's response be?

A. If you wanted to reregister that security in your own name, we would ask that — Ginnie Mae would require that the physical security of the corrent holder be submitted to the bank for re-reistration.

Q. And if I called you and said, Ms. McGrath, someone wants to sell me a Ginnie Mae, can you tell me who actually owns it, would you or would Chemical Bank divulge that information?

A. No, the bank would not give out security information to anybody who was not a holder of a Ginnie Mae, or though some request that the government made.

Q. Okay. But when would a bank, or Chemical Bank give out that information?

A. If you were the registered holder of the security, you would obviously be entitled to that information. If you were a Ginnie Mae, you would have that information, or if you were the insurer of the security, you would be entitled to know who is the registered holder of the security.

Q. If you were approached by, say, a CPA firm that said We'd like to verify that you're holding this for Ms. Evelyn Schoberth, what would your response be?

A. We would look for Ms. Schoberth to provide us with some information that authorized the CPA firm to verify that on her behalf.

Q. If she sent you a letter and said, Dear Chemical Bank, let Earnst & Young know whether or not I own this, would you do that?

A. Yes.

Q. I'd like to move on, ma'am, and ask you to look at the next exhibit. Close that one, please, and pull Exhibit 316.

MS. DARROW: And, your Honor, this is the one that's on this small chart that we handed out to the jury. It's not on big chart form.

Q. Have you see 316 before?

A. Yes, I have.

Q. Where?

A. At your request I verified the information.

Q. Okay. So you've been through each of the pool numbers listed on that?

A. Yes, I have.

Q. Okay. I'd like to do the same thing, only if you, since